Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES J. CERVANTES,

Petitioner,

v.

LARRY JONES,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does 42 U.S.C. §1983 provide a remedy when a police officer fabricates evidence about a confession and then presents that false evidence to a grand jury which returns an indictment that results in three years of unwarranted pre-trial incarceration?

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PETITION FOR WRIT OF CERTIORARI

Petitioner James J. Cervantes respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 13, 1999.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-16) is reported at 188 F.3d 805. The opinion of the district court granting summary judgment (App. 18-30) is reported at 23 F.Supp.2d 885; the opinion of the district court denying respondent's motion to dismiss (App. 31-37) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 17) was entered on August 13, 1999; petitioner did not seek rehearing.

STATUTE INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States and 42 U.S.C. §1983.

STATEMENT

A. The Homicide

On July 20, 1992 a woman named Sally Laverne was found murdered in her apartment in South Elgin, Illinois. (Appendix 1-2.) Police officers under the direction of respondent Jones thoroughly investigated the case. (Appendix 2.)

The officers learned that Laverne had been a sexually active woman (Appendix 14) who freely provided her telephone number to "male strangers" she would meet at a restaurant and who had invited homeless men to live with her.

Petitioner, a former boyfriend of Laverne, was an early suspect in the investigation. (Appendix 15.) After four months of investigation, the police had failed to gather any

physical evidence or eyewitness testimony to link petitioner to the murder. In December of 1992, the police focused their efforts on eliciting a confession from petitioner.

On December 8, 1992, respondent and two other police officers visited petitioner at his home; at about 1:30 a.m. on December 9, 1992, petitioner left his home with the officers to take a polygraph test.[1] Respondent testified in the state criminal proceedings that he did not have probable cause to arrest petitioner on December 8, 1992:

Prosecutor: Officer Jones, what was your intent of going to Mr. Cervantes' house on December 8, 1992?

Jones: It was to see if he could come to the South Elgin Police Department to talk about the death of Sally Laverne and to take a polygraph examination.

Q: Was he a suspect?

A: Yes.

Q: Was it your intent to place him under arrest at 6:00 p.m.?

A: Yes. No, sir.

Q: Why was that?

A: I didn't feel that we had the probable cause for the arrest at that time.

(Transcript of Proceedings, January 19, 1994, 8.)

Petitioner did not make any inculpatory statements at the police station, where he remained until about 5:00 a.m. (Appendix 2.) Respondent Jones drove petitioner home after the interrogation. (Appendix 2.) It was during this ride that

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1. Petitioner testified in the state criminal proceedings that he had accompanied the officers after they told him "if I take it [a polygraph], that they wouldn't bother me any more."

respondent claims that petitioner said he would "like to" confess to the murder (id.) and asked "if I admitted I killed Sally, what would my defense be?" (Id.) Petitioner denies that he told respondent that he would "like to do that" and asserts that he answered respondent by stating "If I confess to a crime that I did not commit what would my defense be?" (Id.)

B. Grand Jury Presentation

Respondent testified before a grand jury on March 16, 1993. (Appendix 39-60.) Respondent told the grand jury that petitioner had "admitted that he may have lied about having been at his mother's house on the day of the murder." (Appendix 50.) Petitioner averred in the district court that he "consistently told Jones that I had gone to my mother's house and that she had not been home." (Appendix 62-63, Cervantes Affidavit, par. 6(c).)

Respondent also told the grand jury that petitioner had admitted that he has difficulties controlling his temper when he drinks. (Appendix 49.) Petitioner averred that he never made such a statement. (Appendix 62-63, Cervantes Affidavit, par. 6(a).) In addition, respondent told the grand jury that petitioner had been drinking beer and smoking marijuana in the evening when the murder was committed. (Supplemental Appendix 57.) Petitioner likewise denied that he had made such a statement. (Appendix 62-63, Cervantes Affidavit, par. 6(a).)

Respondent also related to the grand jury the discussion he claims to have had with petitioner on December 9, 1992 — that petitioner would like to confess and had stated "If I admitted I killed Sally, what would my defense be?" (Appendix 51-52.)

Respondent was the only witness to testify before the grand jury, which returned an indictment charging petitioner with the murder of Sally Laverne.

C. State Court Proceedings

Following the grand jury indictment, petitioner was arrested and remained in custody (facing capital murder charges) from March 17, 1993 until March 7, 1996, when he was found not guilty and released.

D. Federal Court Proceedings

Following his acquittal, petitioner filed an action under 42 U.S.C. §1983 seeking damages from respondent. After rejecting immunity claims on a motion to dismiss (Appendix 31-37), the district court reconsidered, and granted summary judgment on the ground that respondent "is entitled to absolute immunity for any false statements he made to the grand jury." (Appendix 30.)

The Seventh Circuit did not reach the immunity issue on appeal. Instead, the court of appeals concluded that "[t]he existence of probable cause for the prosecution" (Appendix 8) is a complete defense to petitioner's claim that respondent had fabricated evidence. (Appendix 8-9.) The court below elected to resolve the probable cause issue and found that — without the evidence that respondent had allegedly fabricated— there would have been probable cause for the prosecution. (Appendix 15.) On this rationale, the court below affirmed the grant of summary judgment to respondent.

REASONS FOR GRANTING THE WRIT

The rule adopted by the Seventh Circuit in this case was rejected by the Second Circuit as "a mockery of the notion that Americans enjoy the protection of due process of the law and fundamental justice." *Ricciuti v. N.Y.C. Transit Authority,* 124 F.3d 123, 130 (2d Cir. 1997).

The theory of petitioner's claim is that respondent fabricated evidence that was presented to and considered by the grand jury that indicted petitioner. Petitioner contended below that respondent's fabrication of evidence caused petitioner to be indicted, deprived petitioner of an opportunity to achieve pre-trial release on bail, and dissuaded the prosecutor

from abandoning the case after he received the scientific evidence supportive of petitioner's innocence.

The Seventh Circuit agreed that, on review of an order granting summary judgment, it would accept petitioner's assertions about the fabrication of evidence. (Appendix 2-3.) But in the view of the court below, "[t]he existence of probable cause for the prosecution" is a complete defense to petitioner's claim. (Appendix 8-9.)

The rule applied by the Seventh Circuit is contrary to the principle recognized by this Court in *Carey v. Piphus,* 425 U.S. 247, 253-54 (1978) that Section 1983 is intended "to compensate persons for injuries that are caused by the deprivation of their constitutional rights." As the Second Circuit recognized in *Ricciuti v. N.Y.C. Transit Authority, supra,* "[w]hen a police officer creates false information likely to influence a jury's decision and forwards that information to prosecutors, he violates the accused's constitutional right to a fair trial, and the harm occasioned by such an unconscionable action is redressable in an action for damages under 42 U.S.C. 1983." 124 F.3d at 130.

The Eleventh Circuit reached the same result in *Mastroianni v. Bowers,* 160 F.3d 671 (11th Cir. 1998). There, the court held "that clearly established law dictates that an arrest pursuant to a grand jury indictment may violate the Fourth Amendment if the grand jury was misled or experienced undue pressure." Id. at 681-82. The rule adopted by the Seventh Circuit in this case permits police officers to mislead a grand jury with fabricated evidence.

The Tenth Circuit has also held that Section 1983 provides a damages remedy when a witness fabricates evidence that he (or she) presents to a grand jury, irrespective of a subsequent determination of probable cause. *Anthony v. Baker,* 955 F.3d 1395, 1401 (10th Cir. 1992).

The rule in the Fourth Circuit is in accord with the Seventh Circuit on this issue. In *Wilkes v. Young,* 28 F.3d 1362, 1365 (4th Cir. 1994), the Fourth Circuit held that the presentation of fabricated evidence before a grand jury is not actionable if the grand jury could have found probable cause to indict without the perjury.

The rule followed by the Fourth and Seventh Circuits is a literal application of the standard adopted by this Court in a different context in *Franks v. Delaware,* 438 U.S. 154 (1978). There, the Court held that exclusion of evidence would not be required "if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause. Id. at 171-72.

The remedy sought in *Franks* was the suppression of reliable evidence. The remedy sought in this case is money damages for the harm respondent caused by his alleged fabrication of evidence — even if there was "probable cause," without the allegedly fabricated evidence a rational grand jury might well have declined to indict, a judge might have set a more reasonable bond, or the prosecutor might have elected not to seek the death penalty.

This Court should resolve the conflict between the circuits and make plain that 42 U.S.C. §1983 provides a remedy when police officers fabricate evidence.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

November, 1999

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-3

JAMES J. CERVANTES,

Plaintiff-Appellant,

LARRY JONES,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 CV 1520—**George M. Marovich** *Judge.*

ARGUED March 31, 1999—DECIDED August 13, 1999

Before POSNER, Chief Judge, and FLAUM and MANION, Circuit Judges.

MANION, Circuit Judge. Officer Larry Jones testified before an Illinois grand jury about evidence linking James Cervantes to the brutal murder of Cervantes' sometimes girlfriend, Sally Lavergne. After hearing the prosecutor's evidence, including Jones' testimony, the grand jury indicted Cervantes for first degree murder. Pending trial, Cervantes remained incarcerated for almost three years. A jury later acquitted him of the murder. Subsequently, Cervantes sued Jones under 42 U.S.C. §1983 and Illinois law, alleging that Jones violated Cervantes' rights under the Fourth Amendment and Illinois law by testifying falsely before the grand jury. The district court granted summary judgment for Jones, from which Cervantes appeals. We affirm.

-I-

On July 20, 1992, a neighbor discovered the dead body of Sally Lavergne in Lavergne's apartment in South Elgin,

Illinois. Lavergne's death resulted from multiple stab wounds from a butcher's knife in her chest and abdomen, although she also suffered severe skull fractures from a beating with a glass ashtray. There were no signs of forced entry, and the assailant fled without leaving any fingerprints. Cervantes became a suspect early in the investigation, as he was one of Lavergne's few friends. Elgin Deputy Chief of Police Larry Jones first interviewed Cervantes on July 20, and again with another officer present on July 25.

Late at night on December 8, 1992, after discussing the murder with Cervantes at his apartment, Jones and two other officers took Cervantes to the police station for a polygraph examination. The examination indicated that Cervantes was untruthful when he denied killing Lavergne.

At approximately 5:00 a.m. on December 9, after the police finished questioning Cervantes, Jones drove him home. During the ride, Cervantes and Jones carried on a conversation in which Jones mentioned to Cervantes that it seemed he wanted to come clean. Cervantes' response to this statement is disputed, so we accept his version in the posture of this case. According to Cervantes, he responded: "If I confess to a crime that I did not commit, what would my defense be? I've got too much to lose." Jones tells a slightly different story, but the differences are important. Jones testified to the grand jury that Cervantes' response was: "Yes I would like to do that [confess to the crime]. But I've got too much to lose. If I admit I killed Sally, what would my defense be?" Cervantes contends that Jones also lied to the grand jury by telling it that Cervantes admitted to lying about whether he was at his mother's house on the day of the murder,[1] that he

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1. Both we and the parties are being imprecise in referring to the "day of the murder," or the "night of the murder." The police estimate that the murder occurred sometime between 9:45 p.m. on July 19, and 6:30 a.m. on July 20, 1992.

has difficulty controlling his temper when he drinks, and that he had been drinking and smoking marijuana on the night of the murder.

After hearing the prosecutor's evidence, including Jones' version of events, the grand jury indicted Cervantes for Lavergne's murder. He was arrested and held in custody for almost three years while awaiting his trial for capital murder. On March 7, 1996, he was released from custody when a jury acquitted him. Cervantes sued under Illinois law and 42 U.S.C. §1983, alleging that Jones violated his Fourth Amendment and Illinois common law rights by maliciously prosecuting him. Jones moved for summary judgment, arguing, among other things, that probable cause existed for the prosecution and that he enjoyed absolute immunity. The district court granted summary judgment for Jones, holding that Jones did not initiate or continue the prosecution of Cervantes, and that Jones was therefore entitled to absolute immunity. *Cervantes v. Jones,* 23 F.Supp.2d 885, 890, 892 (N.D.Ill. 1998). Cervantes appeals, and we review the grant of summary judgment de novo. *DiGiore v. Ryan,* 172 F.3d 454, 459 (7th Cir. 1999).

-II-

Section 1983 establishes a cause of action for persons deprived of constitutional rights by government officials acting under color of state law. 42 U.S.C. §1983. Where a criminal defendant is prosecuted without reasonable grounds and was unlawfully incarcerated before his trial, he may bring an action for malicious prosecution under §1983, ostensibly for a violation of his Fourth Amendment rights.[2] As

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2. In *Albright v. Oliver,* the Supreme Court held that an action for malicious prosecution cannot be based on substantive due process, but declined to decide whether the Fourth Amendment could serve as the basis for such suits. 510 U.S. 266, 275, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994).

some judges have recognized, "the tort of malicious prosecution fits uneasily within the Fourth Amendment. That amendment proscribes unreasonable searches and seizures and has been held to prohibit arbitrary law-enforcement actions up until the time of arraignment. To justify a Fourth Amendment malicious prosecution claim, then, one has to extend the period of 'seizure' past arraignment." *Kerr v. Lyford,* 171 F.3d 330, 343 (5th Cir. 1999) (Jones, J., concurring); see *Wilkins v. May,* 872 F.2d 190, 194 (7th Cir. 1989) (rejecting the concept of a continuing seizure). For present purposes, however, we assume that Cervantes had a right under the Fourth Amendment to be free from malicious prosecution. To withstand summary judgment, a plaintiff alleging malicious prosecution under §1983 must create a genuine issue of material fact as to each element of this constitutional tort. That is, he must provide some evidence that: (1) he has satisfied the requirements of a state law cause of action for malicious prosecution; (2) a state actor committed the malicious prosecution; and (3) he was deprived of liberty. *Sneed v. Rybicki,* 146 F.3d 478, 480 (7th Cir. 1998); *Reed v. City of Chicago,* 77 F.3d 1049, 1051 (7th Cir. 1996). Under Illinois law, the tort of malicious prosecution requires a showing that: (1) the plaintiff was subject to judicial proceedings; (2) for which there was no probable cause; (3) the defendant instituted or continued the proceedings maliciously; (4) the proceedings were terminated in the plaintiff's favor; and (5) there was an injury. *Rybicki,* 146 F.3d at 480-81; *Reed,* 77 F.3d at 1051.

The district court granted summary judgment based on the "instituted or continued the proceedings maliciously"

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2. *Smart v. Board of Trustees of the Univ. of Ill.,* 34 F.3d 432, 434 (7th Cir. 1994).

element and absolute immunity, which as we shall see, involve essentially the same question. Although the text of §1983 does not admit of any immunities to suits brought under this section, the Supreme Court has held that these suits are subject to the immunities available at common law, so long as they are not in conflict with the purposes of §1983. *Burns v. Reed,* 500 U.S. 478, 484, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991); *Malley v. Briggs,* 475 U.S. 335, 339-40, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). Accordingly, in order to protect prosecutors from vindictive lawsuits which might directly or indirectly impede their roles as public servants, prosecutors enjoy absolute immunity for activities which are "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman,* 424 U.S. 409, 430, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). Similarly, to prevent the harassment of witnesses and to promote unrestrained testimony in criminal cases, the Supreme Court held that witnesses at trials are absolutely immune from suits under §1983 for providing false testimony at trials. *Briscoe v. LaHue,* 460 U.S. 325, 334, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983); see *Jurgensen v. Haslinger,* 295 Ill.App.3d 139, 229 Ill.Dec. 574, 692 N.E.2d 347, 349 (1998) (Illinois law). For the same reasons, this immunity extends to witnesses who commit perjury in pretrial proceedings. *Curtis v. Bembenek,* 48 F.3d 281, 285 (7th Cir. 1995) (police officer entitled to immunity for providing perjurious testimony in probable cause and suppression hearings).[3] Thus, a witness is

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3. Again, immunity is extended to these witnesses because "a witness who knows he may be subjected to costly and time-consuming civil litigation for offering testimony that he is unable to substantiate may consciously or otherwise shade his testimony in such a way as to limit potential liability." Curtis, 48 F.3d at 285 (citation and internal quotations omitted).

absolutely immune from suits based on testimony given before a grand jury. *Jones v. Cannon,* 174 F.3d 1271, 1286 (11th Cir. 1999); *Kincaid v. Eberle,* 712 F.2d 1023, 1024 (7th Cir. 1983) (per curiam).

An exception to this wall of immunity for trial and pre-trial testimony exists for a "complaining witness." Complaining witnesses were not absolutely immune from malicious prosecution suits at common law.[4] *Malley,* 475 U.S. at 340, 106 S.Ct. 1092; *Harris v. Roderick,* 126 F.3d 1189, 1199 (9th Cir. 1997). "The common law made a subtle but crucial distinction between two categories of witnesses with respect to their immunity for false testimony. Those whose role was limited to providing testimony enjoyed immunity; those who played a role in initiating a prosecution— complaining witnesses—did not enjoy immunity." *White v. Frank,* 855 F.2d 956, 958-59 (2d Cir. 1988). To qualify as a complaining witness (and thereby be disqualified from absolute immunity), a witness must play a sufficient role in initiating the prosecution.[5] Id. at 962. Of course, merely

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4. The common law distinguished defamation actions from suits for malicious prosecution. All witnesses had immunity from defamation actions for testimony given in court, but complaining witnesses were still subject to lawsuits for malicious prosecution. *Enlow v. Tishomingo County, Miss.,* 962 F.2d 501, 511 (5th Cir. 1992); *see Burns,* 500 U.S. at 501, 111 S.Ct. 1934 (Scalia, J., concurring and dissenting). In a defamation action, the plaintiff seeks to hold the perjurious witness liable for the defamatory effects of his testimony; in a malicious prosecution claim, the plaintiff's complaint centers on the witness' role in initiating a meritless prosecution. *Enlow,* 962 F.2d at 511 n. 29.

5. A witness' status as a complaining witness is a question of fact. *Anthony v. Baker,* 955 F.2d 1395, 1399 (10th Cir. 1992).

providing false testimony to a grand jury is not enough. Id. at 961. Rather, as we stated in *Curtis*, a complaining witness is one " 'who actively instigated or encouraged the prosecution of the plaintiff.' " 48 F.3d at 286 (quoting *Anthony*, 955 F.2d at 1399 n. 2); see *Ireland v. Tunis*, 113 F.3d 1435, 1447 (6th Cir. 1997) (no immunity for a "complaining witness who set the wheels of government in motion by instigating a legal action"); *Enlow*, 962 F.2d at 511 (a complaining witness is one who actively instigated, encouraged, or perpetrated the prosecution). Thus, the term "complaining witness" is something of a misnomer, as the complainant need not testify as a witness so long as he played a significant role in initiating or procuring the prosecution. *Kalina v. Fletcher*, 522 U.S. 118, 118 S.Ct. 502, 512, 139 L.Ed.2d 471 (1997) (Scalia, J., concurring).

As we mentioned above, the district court found that Jones was not an initiator of the prosecution, and thus Cervantes failed to establish an essential element of his Illinois and federal claim and Jones was entitled to absolute immunity. 23 F.Supp.2d at 890. Indeed, the record showed that while Jones was the one who suggested that the Kane County State's Attorney's Office obtain blood and hair samples from Cervantes, he never exhorted prosecutors to seek an indictment of Cervantes—at least not in so many words. According to the affidavit of the State's Attorney, John Barsanti, he (Barsanti) made the decision to prosecute Cervantes. But we note that Jones was the only witness to testify before the grand jury, and during that testimony he made allegedly false statements indicating that Cervantes essentially confessed to the murder. Jones also appeared to be the lead investigator and the police official who kept the investigation going. *See White*, 855 F.2d at 957, 962 (police officers may be complaining witnesses due to their testimony before a grand jury despite the fact that the prosecutor also played a significant role in advancing the prosecution); *Jones v. City of Chicago*, 856 F.2d 985, 993 (7th Cir. 1988) ("the jury could find that

the defendants systematically concealed from the prosecutors, and misrepresented to them, facts highly material to—that is, facts likely to influence—the decision to prosecute''). After considering these and other facts (which we construe in the light most favorable to Cervantes), we think that Jones' role as the instigator of Cervantes' prosecution is a closer question than the district court suggested. As we said in Jones, ''[i]f police officers have been instrumental in the plaintiff's continued confinement or prosecution, they cannot escape liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him.'' 856 F.2d at 994. Thus, because we may affirm a summary judgment on any ground for which there is adequate support in the record, we turn instead to the easier question of whether probable cause existed. *See EEOC v. North Knox Sch. Corp.*, 154 F.3d 744, 746 (7th Cir. 1998).

The existence of probable cause for the prosecution is a complete defense to an action for malicious prosecution under both Illinois and federal law.[6] *Schertz v. Waupaca County*, 875 F.2d 578, 582 (7th Cir. 1989); *Burghardt v. Remivac*, 207 Ill.App.3d 402, 152 Ill.Dec. 367, 565 N.E.2d 1049, 1052 (1991). The determination of probable cause is a mixed question of law and fact.[7] *Ornelas v. United States*,

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6. The district court did not reach the issue of whether probable cause existed, but relied instead on the grounds mentioned above.

7. A grand jury indictment is usually prima facie evidence of probable cause. *Bontkowski v. United States*, 28 F.3d 36, 37 (7th Cir. 1994). But in construing the facts in the light most favorable to Cervantes, his allegation that the indictment was the product of Jones' perjury precludes us from considering the indictment in our probable cause analysis. A contrary rule could allow an indictment procured by lies to protect a witness from liability for his perjury. *See Harris v. Roderick*, 126 F.3d 1189, 1198 (9th Cir. 1997).

517 U.S. 690, 696, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *Humphrey v. Staszak*, 148 F.3d 719, 725 (7th Cir. 1998). But when facts sufficient to create probable cause are undisputed, probable cause is a question of law. *Potts v. City of Lafayette, Ind.*, 121 F.3d 1106, 1112 (7th Cir. 1997); *People v. Cooke*, 299 Ill.App.3d 273, 233 Ill.Dec. 676, 701 N.E.2d 526, 529 (1998). Of course, a dispute concerning some facts relevant to the probable cause analysis does not preclude a finding of probable cause so long as the finding survives after adopting the plaintiff's version of the disputed facts for which there is some support in the record. *Kerr*, 171 F.3d at 340 n. 13; *Wolter v. Safeway Stores*, 153 F.2d 641, 642 (D.C.Cir. 1946). Probable cause means "the existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted." *Kerr*, 171 F.3d at 340 (footnote and internal quotations omitted); *see Frye v. O'Neill*, 166 Ill.App.3d 963, 117 Ill.Dec. 882, 520 N.E.2d 1233,1241 (1988); *Kincaid v. Ames Dep't Stores, Inc.*, 283 Ill.App.3d 555, 219 Ill.Dec. 215, 670 N.E.2d 1103, 1109 (1996). This analysis is based on "'factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *Humphrey*, 148 F.3d at 726 (quoting *Brinegar v. United States*, 338 U.S. 160, 175, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949)). Importantly, the official's subjective belief as to the legal basis of the prosecution is irrelevant; the test for probable cause is an objective one. *Graham v. Connor*, 490 U.S. 386, 398, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) ("The Fourth Amendment inquiry is one of 'objective reasonableness' under the circumstances...."); *Potts*, 121 F.3d at 1113; *Sheik-Abdi v. McClellan*, 37 F.3d 1240, 1247 (7th Cir. 1994).

In February 1993, the FBI's National Center for the Analysis of Violent Crime prepared a profile of Lavergne's killer based on the evidence gathered from the murder scene,

the assailant's modus operandi, and common sense. While this isn't summary judgement evidence itself, it shows how a reasonable person might interpret the facts which were available to Jones. Using their experience with prior violent crimes, the FBI depicted the probable assailant in terms that are strikingly descriptive of Cervantes. The report described the probable assailant as having low socio-economic status, being at least thirty years of age, an alcohol or drug abuser, and someone who has a history of abusing those weaker than he, such as women or children. The FBI report also concluded (as a reasonable person could) that:

- The nature of the wounds, use of multiple weapons, and the knife being left in the victim, suggest personalized anger and is normally generated from someone who has an anger towards the victim for a longer period of time than the day of this murder. The offender came to the victim's apartment angry; however, because he used weapons of opportunity he may not have planned to go there to kill her. However, once at the victim's apartment, interaction between the victim and the offender escalated to murder.

- Because the offender took time to conduct some cleanup after the murder, it is likely he was familiar with the apartment, and had a higher degree of comfort in the apartment than might be expected from a stranger. [FBI Rept. pp 2-3]

Cervantes' correlation with the profile started with his age, as Cervantes was in his early thirties. With respect to his socio-economic status, Cervantes was not affluent, as he was earning $9 per hour at the time he was arrested. There was no sign of a forced entry, which was consistent with the theory that the assailant was (like Cervantes) known to Lavergne or (again like Cervantes) had keys to Lavergne's apartment. Moreover, Cervantes' relationship with the victim was not a fleeting one, as they occasionally had sexual relations— despite the fact that Cervantes was married to

another woman, Theresa Cervantes. Police interviews with Lavergne's co-workers, family, and friends revealed that the victim was often seen with a man who appeared to be Hispanic, and that Lavergne would let this man use her apartment, would give him rides to work, and may have loaned him money. Lavergne's neighbor—Lillian Peyton--told police that the Hispanic man's name was "James," and confirmed that James had a key to Lavergne's apartment.

With respect to the FBI's reasoning that the assailant was known to be violent and had festering anger towards the victim, a friend who lived with Lavergne during the summer of 1991—Arlene Miller—informed Jones that Lavergne had complained that Cervantes had beaten her, and showed bruises from the beatings on her head, face, and arms. These beatings were also in accordance with the FBI's inference that the assailant had a history of abuse toward weaker people. Cervantes' violent nature was further confirmed by Sandra Skoty— Cervantes' former housemate and mother of his child—who told the police that Cervantes had difficulty controlling his temper when he drank alcohol, and that on one occasion when she was pregnant, Cervantes struck her. Theresa Cervantes and Penny Newman (Cervantes' girlfriend and housemate at the time of the murder) also told the police that Cervantes had struck them when he had been drinking, and Theresa Cervantes has a scar on her lip to prove it.

Cervantes was also a known alcoholic, consistent with the FBI's projection that the killer was an alcohol or drug abuser. Furthermore, Newman confirmed what the other women in Cervantes' life said: he was especially violent after drinking alcohol. Beyond Cervantes' correlation with the FBI's profile, numerous other facts cast suspicion on Cervantes./ Marilene Gable—a friend of Penny Newman—told police that Newman told her on the night of Lavergne's murder that Newman and Cervantes were going over to James's friend Sally's house that evening. After the murder occurred, Newman told Gable that Lavergne was indeed the

woman she and James had intended to visit that night, but that they never made the trip to Lavergne's apartment. Newman gave no reason for the sudden change of plans, other than that Cervantes was tired. As to particularized anger towards Lavergne, the owner of a restaurant that Lavergne frequented—Marguerite Lombardo--told police that Lavergne and an Hispanic man had been at the restaurant a few days prior to the murder, and after the Hispanic man left Lavergne confided to her that the man was "mad" at her because she told him that he could no longer use her apartment. Furthermore, Cervantes admits that he met Lavergne at the restaurant around that time in order to invite her to dinner while his girlfriend was away. Additionally, Cervantes had an opportunity to commit the crime. Newman told police that she was not sure what time she went to bed the night of the murder and acknowledged that Cervantes might have left the house after she went to sleep, thus negating Cervantes' alibi. Also, a polygraph examination indicated that Cervantes was not being truthful when he denied killing Lavergne.[8]

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8. After a suppression hearing (not at issue here) before Kane County Circuit Court Judge James Doyle, Judge Doyle determined that the FBI agent who conducted Cervantes' polygraph examination committed perjury. Specifically, Agent Michael Hanna lied under oath at the suppression hearing when he told Judge Doyle that he was admitted to the Iowa bar. This fact was relevant to the suppression hearing because around the time of the polygraph examination, Cervantes suggested to Hanna that he might like to speak to a lawyer. In an effort to discourage this, Hanna told Cervantes that anything Cervantes wanted to discuss with a lawyer he could address to Hanna, as he was a lawyer. Of course, we find it disheartening, to say the least, that a federal agent would use lies in an attempt to convict a defendant in a capital murder case. But although Cervantes contends that Hanna's penchant for dishonesty tainted the polygraph results, our first analysis of probable cause is based on the information available at the time the prosecution was instituted. At that time, nobody had any reason to suspect that

Similarly, Newman's polygraph results suggested that she was untruthful when she denied involvement in the murder or knowledge of who was involved.[9] Finally, another part of Cervantes' alibi—that he was at his mother's house sometime during the day of the murder—could not be corroborated. Furthermore, it might seem strange to a reasonable person that Cervantes picked that day to visit his mother, as his mother told police that she hadn't seen him in some time and didn't even know where he lived.[10] probable cause existed); *Herb Hallman Chevrolet v. Nash-Holmes,* 169 F.3d 636, 643

Hanna was dishonest. Regardless, probable cause to prosecute Cervantes existed even without the polygraph evidence.

9. Cervantes argues that polygraph evidence cannot be considered in determining whether probable cause existed for prosecuting him. It is true that due to the suspected unreliability of polygraphs, Illinois courts have created a rule that the police, grand juries, and courts may not rely on polygraph evidence in determining whether probable cause exists. *People v. Allen,* 249 Ill.App.3d 1001, 189 Ill.Dec. 788, 620 N.E.2d 1105, 1114 (1993); *People v. McClellan,* 232 Ill.App.3d 990, 175 Ill.Dec. 476, 600 N.E.2d 407, 416 (1992). But as a matter of federal law, polygraph results are one of many factors which may be used in determining whether, from an objective viewpoint, probable cause for an arrest existed under the Fourth Amendment. *Booker v. Ward,* 94 F.3d 1052, 1058 (7th Cir. 1996) (relying on polygraph results as one factor in finding that Illinois police officers had probable cause for an arrest as a matter of law); *see Kerr,* 171 F.3d at 341 (relying on polygraph evidence in determining that

10. Cervantes argues that his mother certainly knew where he lived. But her actual knowledge is irrelevant; the question is what did she tell the police, and Cervantes offers no evidence that his mother did not make this statement to the police.

(9th Cir. 1999) (same); *Craig v. Singletary*, 127 F.3d 1030, 1046 (11th Cir. 1997) (indications of deceptiveness from polygraph may be one factor considered in probable cause analysis); *Johnson v. Schneiderheinz*, 102 F.3d 340, 342 (8th Cir. 1996) ("the negative polygraph exam results were not the only undisputed facts upon which probable cause could rest"); *Marx v. Gumbinner*, 905 F.2d 1503, 1506, 1507 (11th Cir. 1990); *Bennett v. City of Grand Prairie, Tex.*, 883 F.2d 400, 405-06 (5th Cir. 1989) (polygraph results, in conjunction with other evidence, may be used in determining whether probable cause exists to issue warrant). Therefore, this argument is without merit. Furthermore, as we mentioned above, the polygraph evidence was not essential to establishing probable cause.

Because probable cause is based on the totality of the circumstances, exculpatory evidence is also relevant. Although Lavergne's blood was found throughout the apartment, no analyzable fingerprints were found. But this by no means eliminates probable cause for suspecting Cervantes. Rather, using the rationale employed by the FBI report, the wiping away of fingerprints enhances the suspicion that the assailant was someone like Cervantes, who was familiar with the apartment, knew that nobody was likely to disturb him, and thus was comfortable taking his time to erase any traces of his presence.

More favorable to Cervantes was Lavergne's previous promiscuity and the fact that she once allowed another man to stay overnight in her apartment, thus raising the possibility that someone else committed the crime. Cervantes suggests that this possibility gets some support from the DNA which was extracted from blood found on a towel in Lavergne's bathroom, as it belonged to neither the victim nor Cervantes. Also in Cervantes' favor, there were no eyewitnesses or physical evidence linking Cervantes to the crime. At the same time, there were no eyewitnesses linking anyone else to the crime. Finally, there were Cervantes' own self-serving

denials—the value of which was diminished by the polygraph results—and his uncorroborated alibi that he was at home the night of the murder. Perhaps some or all of these tidbits ultimately caused the jury not to find guilt beyond a reasonable doubt. But preliminarily, at least, most of the evidence pointed to Cervantes. He, after all, was the only man known to have had keys to Lavergne's apartment, and he still had one key after the murder. Also, he was the only man Lavergne ever mentioned to her sister Diane. In short, the totality of the facts in the record and the inferences derived from them would lead a reasonable person to the strong suspicion that Cervantes murdered Lavergne. Therefore, even without Jones' disputed testimony, probable cause existed to prosecute Cervantes for this crime. *Cf. Meehan v. Town of Plymouth*, 167 F.3d 85, 91 (1st Cir. 1999) (describing the circumstantial evidence that led to a finding of probable cause). Because the prosecution was supported by probable cause as a matter of law, Jones has a complete defense to the malicious prosecution suit, and Cervantes is unable to establish an essential element of his Illinois law claim and his §1983 claim based on the Fourth Amendment.[11] Therefore, the

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11. Cervantes also complains that he was not given time to depose Jones and the prosecuting attorney, John Barsanti. In responding to Jones' motion for summary judgment, Cervantes argued to the district court that Barsanti's affidavit was irrelevant, but argued in the alternative that if it were relevant, ruling on the motion should be continued pursuant to Fed.R.Civ.P. 56(f), so that Cervantes could depose Jones and Barsanti. The district court did not abuse its discretion in addressing the summary judgment motion without granting Cervantes additional time for depositions. First, a request for additional time which is conditioned on whether the district court thinks a deposition would be fruitful is not a proper request for a continuance, as it requires the district judge to act as the plaintiff's agent and to advise him on what discovery he should pursue. Also, Cervantes' excuse for failing to depose Barsanti before the

district court correctly granted summary judgment.[12]

AFFIRMED.

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motion for summary judgment—that he refrained from taking depositions in order to foster an atmosphere conducive to settlement—is insufficient and borders on the foolish. *See Farmer v. Brennan*, 81 F.3d 1444, 1449 (7th Cir. 1996) (to obtain a continuance under Fed.R.Civ.P. 56(f) a party must (1) request a continuance, and (2) provide a sufficient reason for requesting the continuance).

12. Because we affirm the summary judgment, Jones' motion to strike Cervantes' reply brief is moot.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-3

JAMES J. CERVANTES,

Plaintiff-Appellant,

LARRY JONES,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 CV 1520—**George M. Marovich** *Judge.*

[August 13, 1999]

JUDGMENT — WITH ORAL ARGUMENT

Honorable Richard A. Posner, Chief Judge
Honorable Joel M. Flaum, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES J. CERVANTES,

Plaintiff,

No. 97 CV 1520 *v.*

LARRY JONES,

Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff James J. Cervantes ("Cervantes") filed this action against Defendant South Elgin Deputy Chief of Police Larry Jones ("Jones") pursuant to 42 U.S.C. §1983 (" s 1983") and Illinois law alleging claims of malicious prosecution. Cervantes alleges that Jones fabricated evidence that made it falsely appear that Cervantes had committed murder. Cervantes further alleges that Jones falsely testified before a grand jury to the truthfulness of the fabricated evidence and that, as a result, Cervantes was indicted for murder. Now before the Court is Jones' motion for summary judgment. For the reasons set forth below, this Court grants Jones' motion.

BACKGROUND[1]

At approximately 6:30 a.m. on July 20, 1992, a neighbor of Sally Lavergne ("Lavergne") notified the police after hearing Lavergne's alarm clock ringing and finding Lavergne's door open. The police subsequently found Lavergne dead in her home in South Elgin, Illinois. A post-mortem evaluation of Lavergne suggested, among other

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1. Unless otherwise indicated, the following facts are not disputed.

things, that Lavergne died of multiple stab wounds to her chest and abdomen.

Upon finding Lavergne, the police immediately began an investigation by, among other things, interviewing Lavergne's co-workers, family and friends. The investigation regarding Lavergne's murder took place over several months and included various officers and agents from the South Elgin Police Department, Illinois State Police Department, St. Charles Police Department, West Dundee Police Department and the FBI. One of the police officers investigating Lavergne's murder was Jones.

After receiving information suggesting that Cervantes had been intimately involved with Lavergne prior to her death, Jones interviewed Cervantes on July 20, 1992 and again, with another detective, on July 25, 1992. On December 8, 1992, Jones and two other detectives again interviewed Cervantes at Cervantes' apartment. Later that night, Cervantes went to the police station around midnight and took a polygraph examination.

At about 5:00 a.m. the next morning, December 9, 1992, Jones gave Cervantes a ride home from the police station. During the ride home, Jones stated to Cervantes that it seemed like Cervantes wanted to admit what he had done and "come clean." (Def. 12(m), Ex. 1(b) at 21; Ex. 4 at 74.) The parties dispute Cervantes' response to this statement. According to Jones' grand jury testimony given March 16, 1993, Cervantes stated: "Yes, I would like to do that. But I've got too much too [sic] lose. If I admit I killed Sally, what would my defense be?" (Id. at 21-22.) According to Cervantes' testimony at a hearing held January 24, 1994 regarding a motion to suppress, Cervantes responded to Jones by stating: "[I]f I confess to a crime that I did not commit, what would my defense be? I got too much to lose." (Def. 12(m), Ex. 4 at 75.)

In February of 1993, Jones went to John A. Barsanti ("Barsanti"), Chief of the Criminal Division of the Kane County State's Attorney's Office, regarding the possibility of seeking a warrant for hair and blood samples from Cervantes in connection with the Lavergne murder investigation. Upon his independent review of the investigative reports, Barsanti concluded that there were sufficient grounds to take the matter before the grand jury and to seek an indictment of Cervantes for Lavergne's murder. (Def. 12(m) p 40; Pl. 12(n) p 40.) Jones testified before the grand jury after being subpoenaed by Barsanti, and Cervantes was subsequently indicted. Following the grand jury indictment, Cervantes was arrested and remained in custody from March 17, 1993 until March 7, 1996, when he was found not guilty and released.

On March 6, 1997, Cervantes filed this action alleging that Jones engaged in malicious prosecution in violation of the Fourth Amendment and Illinois law. Cervantes contends that as a result of Jones' actions, Cervantes lost wages, suffered severe emotional distress and, while incarcerated, was seriously injured by other inmates. Cervantes seeks compensatory and punitive damages. On July 29, 1997, this Court denied Jones' motion to dismiss in which Jones argued that: (1) Cervantes had failed to state a claim for malicious prosecution; and (2) he enjoyed absolute immunity for any false testimony given to the grand jury. See *Cervantes v. Jones*, 1997 WL 433685 (N.D.Ill. July 29, 1997). Jones now moves for summary judgment.

SUMMARY JUDGMENT STANDARD OF REVIEW

Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). When making such a determination, the court must construe the evidence and make all reasonable inferences in favor of the non-moving party. *See Anderson*

v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Summary judgment is appropriate, however, when the non- moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). *See also Courtney v. Biosound*, 42 F.3d 414, 418 (7th Cir. 1994).

DISCUSSION

To state a claim for malicious prosecution under s 1983, a plaintiff must demonstrate that: (1) he has satisfied the requirements of a state law cause of action for malicious prosecution; (2) the malicious prosecution was committed by state actors; and (3) he was deprived of liberty. *See Washington v. Summerville*, 127 F.3d 552, 558 (7th Cir. 1997); *Reed v. City of Chicago*, 77 F.3d 1049, 1051 (7th Cir. 1996). To state a claim for malicious prosecution under Illinois law, a plaintiff must allege that: (1) he was subjected to judicial proceedings; (2) for which there was no probable cause; (3) the defendant instituted or continued the proceedings maliciously; (4) the proceedings terminated in plaintiff's favor; and (5) there was an injury. *See Sneed v. Rybicki*, 146 F.3d 478, 481 (7th Cir. 1998).

In his motion for summary judgment, Jones argues that: (1) Cervantes cannot demonstrate all of the factors necessary to state a claim for malicious prosecution under Illinois law; and (2) Jones enjoys absolute immunity for presenting any false testimony to the grand jury. This Court will address these arguments in turn.[2]

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2. Jones additionally argued that Cervantes failed to timely file his s 1983 malicious prosecution claim. "For malicious prosecution ... the cause of action does not accrue until the criminal proceedings are over." *Sneed v. Rybicki*, 146 F.3d 478, 481 (7th Cir. 1998). Here, it is undisputed that the

I. Malicious Prosecution Claim

As stated, to prove a malicious prosecution claim, a plaintiff must satisfy the requirements of a state law cause of action for malicious prosecution. Jones asserts that Cervantes cannot do so here because, as a matter of law, (1) Jones did not institute or continue the proceedings maliciously and (2) there was probable cause for Cervantes to be subjected to judicial proceedings.

In order to be liable for malicious prosecution, "a defendant either must have initiated a criminal proceeding or his participation in it must have been of so active and positive a character as to amount to advice and cooperation." *Denton v. Allstate Ins. Co.*, 152 Ill.App.3d 578, 583, 105 Ill.Dec. 471, 504 N.E.2d 756, 760 (1st Dist. 1986). Put another way, "[l]iability for malicious prosecution ... extends to [police officers] who played a significant role in causing the prosecution of the plaintiff [.]" *Frye v. O'Neill*, 166 Ill.App.3d 963, 975, 117 Ill.Dec. 882, 520 N.E.2d 1233, 1240 (4th Dist. 1988). *See also Reed*, 77 F.3d at 1053 (plaintiff must show that the officer used improper influence on the prosecutor or made knowing misstatements to the prosecutor in order to secure prosecution); *Newsome v. James*, 968 F.Supp. 1318, 1323 (N.D.Ill. 1997) (stating the issue as whether the police officer "got the ball rolling in the unwarranted prosecution" of the plaintiff). Cervantes' action for malicious prosecution centers around the disputed

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criminal proceedings ended on March 7, 1996, that Cervantes filed his Complaint on March 6, 1998 and that the statute of limitations period for malicious prosecution claims under s 1983 is two years. Therefore, the Court rejects Jones' limitations argument.

conversation which occurred between Cervantes and Jones coming home from the police station on the morning of December 9, 1992, i.e., whether Cervantes stated that he would like to confess to the Lavergne murder.[3] (See Pl. Resp. at 2, 11.) Upon careful review of the record here, even assuming that Jones' grand jury statements were fabrications, the Court finds that a reasonable jury could not conclude that Jones "institute[d] or continue [d] the proceedings maliciously" as defined above.

Instead, the evidence indisputably reveals that Barsanti, not Jones, instituted Cervantes' criminal proceedings. Indeed, Cervantes admits that Barsanti independently reviewed the investigative reports into the Lavergne murder and concluded that there were sufficient grounds to take the matter before the grand jury. (See Def. 12(m), Ex. 1 p 3; Pl. 12(n) p 40.) Additionally, Barsanti states that "[a]t no

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3. Cervantes' affidavit alludes to certain other allegedly inaccurate statements made by Jones to the grand jury. (See; Pl. 12(n), Ex. 7 p 6.) Jones moves to strike this portion of Cervantes' affidavit, arguing that these contentions contradict Cervantes' prior answers to certain interrogatories. (See Def. Mot. to Strike at 2-4.) Although Cervantes alludes to these additional grand jury statements by Jones in his response brief (see Pl. Resp. at 6-7), Cervantes does not argue that these statements were fabrications which played a role in Cervantes' indictment. Instead, as stated by Cervantes, "[t]he primary disputed question is whether defendant Jones fabricated the story that plaintiff said he would 'like to confess' to Lavergne's murder" and whether that alleged fabrication caused Cervantes' injuries. (Id. at 11. See also Pl. 12(n) p. 56.) Because these additional statements do not form the basis for Cervantes' claim, this Court need not discuss them further, and Jones' motion to strike Cervantes' presentation of the statements is denied as moot.

time did ... Jones ever request that an indictment be sought of James Cervantes, that decision I reached on my own." (See Def. 12(m), Ex. 1 p 4.) And, once Barsanti initiated the prosecution, Cervantes admits that Barsanti alone made the decision to continue Cervantes' prosecution. (Def. 12(m) p 54; Pl. 12(n) p 54.)

The evidence also discloses that Jones' alleged false statements played no role in the initiation of proceedings against Cervantes. Barsanti states that although he reviewed reports containing the allegedly false statements by Jones, "those statements did not play a role in [Barsanti's] decision to seek an indictment of James Cervantes because in [his] view, those statements were equivocal in nature." (See Def. 12(m), Ex. 1 p p 8.) Barsanti states that he would have sought an indictment of Cervantes even without those statements. (Id.)

In his affidavit, Barsanti provides this Court with a considerable list of facts which he states led him to conclude that there was probable cause to prosecute Cervantes for Lavergne's murder. (See Def. 12(m), Ex. 1 pp 6(a)-(z)). Some of the evidence which led to Barsanti's decision, in brief, were the facts that:

- the crime scene indicated no sign of forced entry, suggesting that Lavergne knew her assailant (id. p 6(h));
- the similar nature of a knife used in the murder and the knives in the victim's kitchen suggested that the murder was not planned (id. p 6(e));
- interviews from family and friends suggested that Cervantes was often seen with Lavergne (id. p 6(i)-(m));
- according to interviews with police investigators, Cervantes admitted to occasionally residing with Lavergne when he was having marital problems and having had a key to Lavergne's apartment (id. p 6(o));

- police believed that Cervantes' initial alibi, that he was at his mother's on the day the murder occurred, was contradicted by further investigation (id. p 6(o));
- in another police interview, a waitress stated that, after serving Lavergne and a man who fit Cervantes' description, Lavergne told the witness that the man was mad because Lavergne had told him that he could no longer use her apartment (id. p 6(p));
- in another police interview, an acquaintance of Lavergne and Cervantes stated that, on at least one occasion, Cervantes beat Lavergne (id. p 6(q));
- in other police interviews, a woman who had once lived with Cervantes stated that he drank heavily and had difficulty controlling his temper when he was intoxicated, and Cervantes' estranged wife stated that, on one occasion, Cervantes struck her on her face after confronting him about his drinking (id. pp 6(r-s));
- in another police interview and subsequently in a polygraph examination, Cervantes' girlfriend, Penny Newman, stated that Cervantes was a violent person, especially after drinking, and had struck her at least three times during their relationship (id. p 6(v-w));
- according to a police interview on December 8, 1992, Cervantes admitted that he was smoking and drinking the night of July 19, 1992, that he had physically abused many women in the past, and that he had been romantically involved and had physically abused Lavergne in the past (id. p 6(x));
- a polygraph examination administered by an FBI agent conducted on December 9, 1992, suggested that Cervantes' responses to questions of whether he caused Lavergne's death were indicative of deception; in an additional interview with Cervantes, the FBI agent stated that Cervantes admitted to drinking and smoking pot the

day of Lavergne's murder and that he might have walked up Lavergne's residence on the evening of the murder.[4] (Id. p 6(y).)

Although Cervantes disputes many of these facts—and maybe properly so, in light of the fact that he was acquitted at trial—pivotally here, Cervantes presents no evidence disputing Jones' evidence that it was Barsanti, not Jones, who initiated and continued Cervantes' prosecution. Nor does Cervantes present any evidence that Jones' alleged fabrications had any role in the initiation and continuation of Cervantes' prosecution. Thus, there is simply no evidence upon which a reasonable jury could find that Jones played a "significant role" in causing Cervantes' prosecution or otherwise actively participated in that prosecution.[5] The case

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4. Parenthetically, on Cervantes' motion, the trial judge suppressed certain statements made to the FBI agent who took his polygraph upon finding that the statements were made involuntarily and in violation of Cervantes' Miranda rights. The trial judge additionally suppressed a statement by Cervantes to Jones as "fruit of the poisonous tree." On appeal, the appellate court affirmed the suppression of Cervantes' statement to the FBI agent, but reversed the suppression of Cervantes' statement to Jones.

5. Rather than present evidence on this issue, Cervantes states that he does not have "personal knowledge of conversations between Jones and Barsanti about [his] prosecution" and therefore he is "unable to agree or disagree with the contentions[.]" (Pl. 12(n), Ex. 7 p 9.) Cervantes requests that "[i]f these contentions are material to the motion for summary judgment, ... ruling on the motion [be] continued until [he has] had a full and fair opportunity to depose Jones and Barsanti." (Id.) As Jones states, Cervantes' request is improper. If Cervantes wanted to depose Jones and Barsanti before responding to Jones' summary judgment motion, he should have moved for additional discovery under Fed.R.Civ.P. 56(f), giving this Court "an adequate explanation ... of the reasons why the

Cervantes primarily relies upon, *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988), does not alter the result. In *Jones*, the plaintiff alleged that the defendant police officers arrested him without probable cause and prosecuted him despite the lack of any reasonable grounds to believe that he had committed the crimes. Evidence introduced at trial established that the police officers filed false reports and supplied false information to the state's attorney about Jones' culpability. Evidence further established that the state's attorney unwittingly relied upon those falsehoods in deciding to prosecute Jones. The police officers in Jones attempted to hide behind the state's attorney's decision to prosecute Jones, arguing that all of Jones' injuries resulted from that decision rather than their misconduct. The Seventh Circuit rejected the police officers' argument, stating that "a prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to

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extension is necessary," as required under that rule. *Farmer v. Brennan*, 81 F.3d 1444, 1449 (7th Cir. 1996). Cervantes did not do so. Cervantes states that he has not deposed Jones and Barsanti "to foster the climate for a reasonable settlement." (Pl. Resp. at 3.) However, settlement negotiations do not excuse a party from diligence in conducting necessary discovery. *See Sofo v. Pan-Am. Life Ins. Co.*, 13 F.3d 239, 242 (7th Cir. 1994). Furthermore, it was Cervantes' responsibility, not this Court's, to determine whether deposition testimony of Jones and Barsanti was "material" and, if so, to either timely obtain the discovery or timely request an extension under Rule 56(f). Because Cervantes has not done either, this Court must rule on this motion on the record before it. *See, e.g., Anderson v. Rizza Chevrolet, Inc.*, 9 F.Supp.2d 908, 915 (N.D. Ill. 1998); *Milton v. Chicago Park Dist.*, No. 96 C 6088, 1997 WL 417913, at *1 (N.D.Ill. July 23, 1997).

trial—none of these decisions will shield a police officer who deliberately supplied misleading information that influenced the decision." *Jones,* 856 F.2d at 994. The important aspect of the Jones decision for purposes of this case is that the alleged fabricated evidence must "influence the decision" to indict. Thus, if Barsanti proceeded with the prosecution independent of any misinformation allegedly supplied or concealed by Jones, then Cervantes cannot establish that the alleged deceit injured him. *See Buckley v. Fitzsimmons,* 20 F.3d 789, 796-97 (7th Cir. 1994) (noting that, in Jones, the plaintiff "alleged that the police had fabricated evidence, deceiving the prosecutor into filing criminal charges that the prosecutor never would have initiated had he known the truth ") (emphasis added). In considering Jones' motion to dismiss, this Court concluded that Cervantes had sufficiently alleged the type of claim recognized as actionable under Jones. This was because "[Cervantes'] claim, essentially, [was] that as a result of [Jones'] fabricated evidence, prosecutors filed criminal charges against [Cervantes] that they would not have otherwise initiated." *Cervantes,* 1997 WL 433685, at *4.

The record now clearly demonstrates, however, that this case is not analogous to *Jones.* As explained, supra, there is no evidence from which a jury could reasonably determine that as a result of Jones' allegedly fabricated evidence, Barsanti filed criminal charges against Cervantes that he would not have otherwise initiated. Therefore, because Cervantes cannot, as a matter of law, demonstrate this element of the malicious prosecution case, summary judgment must be granted for Jones.[6] II. Absolute Immunity

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6. Jones additionally argued that Cervantes could not make out a malicious prosecution claim because there was sufficient probable cause to prosecute Cervantes without the alleged fabricated evidence. The existence of probable cause, under both Illinois and federal law, is an absolute defense to an action for

As he did in his motion to dismiss, Jones additionally argues that he has absolute immunity for any false statements he made before the grand jury. As this Court explained in its earlier opinion, police officers generally possess absolute immunity from s 1983 liability for claims based on grand jury testimony. *See Cervantes,* 1997 WL 433685, at *2 (quoting *Curtis v. Bembenek,* 48 F.3d 281, 284 (7th Cir. 1995)). The Court noted, however, that there is no absolute immunity for a police officer who acts as a complaining witness, i.e., a party "who actively instigated or encouraged the prosecution of the plaintiff." Id. (quoting *Curtis,* 48 F.3d at 284 n. 5).

In ruling on Jones' motion to dismiss, this Court noted that: courts draw a distinction between those witnesses who played a role in initiating a prosecution and those whose role was limited to providing testimony. An officer in the former role is akin to a complaining witness and is not absolutely immune for his grand jury testimony if the testimony is relevant to the manner in which he initiated or perpetuated the prosecution of the plaintiff. *Cervantes,* 1997 WL 433685, at *3. Accepting as true statements in Cervantes' Complaint indicating that Jones initiated a baseless

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malicious prosecution. *See Schertz v. Waupaca County,* 875 F.2d 578, 582 (7th Cir. 1989); *Myatt v. City of Chicago,* 816 F.Supp. 1259, 1267 (1992); *Burghardt v. Remiyac,* 207 Ill.App.3d 402, 406, 152 Ill.Dec. 367, 565 N.E.2d 1049, 1052 (2d Dist. 1991). Here, although Jones has identified a considerable list of factors which Jones alleges demonstrate that Barsanti had probable cause to indict Cervantes, see, supra, at pp. 889-90, it is unnecessary here, in light of the rest of this opinion, to determine as a matter of law whether there was probable cause independent of Jones' alleged fabrications for Barsanti to seek Cervantes' indictment.

prosecution against Cervantes, this Court declined to dismiss Cervantes' Complaint on this ground.

Nevertheless, on the basis of the facts presented to the Court in this summary judgment motion, the Court now finds that Jones enjoys immunity for his grand jury statements. As the Seventh Circuit has remarked, "the complaining witness theory is closely associated with the common law cause of action for malicious prosecution." *Curtis*, 48 F.3d at 285. In both situations, the court seeks to determine whether the witness played a role in initiating or encouraging the prosecution.

Here, as the Court explained in the context of Cervantes' malicious prosecution claim, there is no evidence disputing Jones' contention that it was Barsanti, not Jones, who initiated Cervantes' prosecution. Barsanti independently reviewed the investigative reports and concluded, on his own, that there were sufficient grounds to take the matter before the grand jury and, upon indictment, to continue the prosecution of Cervantes. The evidence further discloses that Barsanti selected Jones to testify—indeed, subpoenaed Jones to testify—because of Jones' rank and familiarity with the investigation. (Def. 12(m), Ex. 1 p 9.) Under the factual circumstances here, Jones cannot be considered a "complaining witness," and, therefore, Jones is entitled to absolute immunity for any false statements he made before the grand jury.

CONCLUSION

For the foregoing reasons, Jones' motion for summary judgment is granted. Jones' motion to strike Cervantes' affidavit is denied.

ENTER:

/s/George M. Marovich
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES J. CERVANTES,

Plaintiff,

No. 97 CV 1520 *v.*

LARRY JONES,

Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff James J. Cervantes (''Cervantes'') filed this action against Defendant South Elgin Deputy Chief of Police Larry Jones (''Jones'') pursuant to 42 U.S.C. §1983 (''Section 1983'') and Illinois law alleging claims of malicious prosecution. Cervantes alleges that Jones fabricated evidence that made it falsely appear that Cervantes had murdered a woman named Sally Laverne. Cervantes further alleges that Jones falsely testified before a grand jury to the truthfulness of the fabricated evidence and that, as a result, Cervantes was indicted for murder. Now before the Court is Jones's motion to dismiss Cervantes's Complaint. For the reasons set forth below, this Court denies Defendant's motion.

BACKGROUND

The following factual allegations are accepted as true for purposes of Defendant's motion to dismiss. *Bowman v. Franklin*, 980 F.2d 1104, 1107 (7th Cir. 1992), cert. denied, 508 U.S. 940, 113 S.Ct. 2417, 124 L.Ed.2d 639 (1993). On July 20, 1992, a woman named Sally Laverne (''Laverne'') was murdered in her home in South Elgin, Illinois. Cervantes alleges that although he was not involved in Laverne's death, beginning in July 1992, Jones, acting under color of law, sought to obtain evidence to link Cervantes with Laverne's death. In March 1993, after failing to obtain

any evidence to link Cervantes with the murder, Jones, acting *willfully, wantonly, and maliciously, fabricated evidence* that caused Cervantes to be charged with Laverne's death. Specifically, Cervantes contends that Jones falsely claimed that Cervantes had made an inculpatory oral admission regarding the murder. According to Cervantes, without Jones's made-up story, there was no probable cause for the initiation of any criminal proceeding against Cervantes.

On March 16, 1993, Jones testified before a grand jury to the truthfulness of the evidence that he allegedly had fabricated against Cervantes. On the basis of Jones's testimony, Cervantes was indicted for Laverne's murder. Cervantes was incarcerated on March 17, 1993 and remained in custody until March 7, 1996 when he was found not guilty and released.

On April 17, 1997, Cervantes filed a Complaint alleging that Defendant's actions violated the Fourth Amendment of the Constitution and also alleging a pendant state law malicious prosecution claim. Cervantes contends that as a result of Jones's actions, Cervantes lost wages, suffered severe emotional distress and, while incarcerated, was seriously injured by other inmates; Cervantes seeks compensatory and punitive damages.

Defendant now moves to dismiss Cervantes's Complaint in its entirety. Jones maintains that he enjoys absolute immunity for presenting false testimony to the grand jury and thus, that Cervantes cannot assert a claim based on such testimony. In addition, Jones contends that Cervantes has failed to allege a claim upon which relief can be granted based on Jones's alleged fabrication of evidence.

DISCUSSION

When considering a motion to dismiss, the court tests the sufficiency of the complaint, not the merits of the suit. *Triad Assocs. v. Chicago Hous. Auth.*, 892 F.2d 583, 586 (7th Cir. 1989), *cert. denied*, 498 U.S. 845, 111 S.Ct. 129,

112 L.Ed.2d 97 (1990). The court accepts all well-pleaded factual allegations as true and draws all reasonable inferences in favor of the plaintiff. *Antonelli v. Sheahan*, 81 F.3d 1422, 1427 (7th Cir. 1995); *Dimmig v. Wahl*, 983 F.2d 86, 87 (7th Cir. 1993). A motion to dismiss will be granted only if it is clear that the plaintiff can prove no set of facts that would entitle him to relief. *Conley v. Gibson*, 335 U.S. 41, 45-46 (1957).

To state a claim for malicious prosecution under Section 1983, a plaintiff must demonstrate that: (1) he has satisfied the requirements of a state law cause of action for malicious prosecution; (2) the malicious prosecution was committed by state actors; and (3) he was deprived of liberty. *Reed v. City of Chicago*, 77 F.3d 1049, 1051 (7th Cir. 1996). To state a claim for malicious prosecution under Illinois law, a plaintiff must allege that: (1) he was subjected to judicial proceedings; (2) for which there was no probable cause; (3) the defendant instituted or continued the proceedings maliciously; (4) the proceedings terminated in plaintiff's favor; and (5) there was an injury. *Curtis v. Bembenek*, 48 F.3d 281, 286 (7th Cir. 1995) (citations omitted).

A. Grand Jury Testimony With respect to Cervantes's claim that Jones knowingly presented false testimony to a grand jury, Jones argues that he is absolutely immune from suit. It is well established in this circuit that police officers are entitled to absolute immunity from suit under Section 1983 for giving false grand jury testimony to the detriment of potential plaintiffs. *Curtis*, 48 F.3d at 284; *Kincaid v. Eberle*, 712 F.2d 1023, 1023-24 (7th Cir.), cert. denied, 464 U.S. 1018, 104 S.Ct. 551, 78 L.Ed.2d 725 (1983). The Seventh Circuit has explained: "Whether testifying at trial or in a pretrial proceeding, a witness who knows he may be subjected to costly and time-consuming civil litigation for offering testimony that he is unable to substantiate may consciously or otherwise shade his testimony in such a way as to limit potential liability. Because of such tendencies to shade

testimony, witness immunity is accorded full disclosure as a means of ascertaining the truth." *Curtis*, 48 F.3d at 285 (quoting *Holt v. Castenada*, 832 F.2d 123, 125 (9th Cir. 1987)) (citations omitted). Cervantes argues, however, that Jones is not entitled to such immunity in this case.

Specifically, Cervantes contends that while a mere lay witness cannot be sued for his or her false testimony, this immunity does not extend to police officers who testify as a "complaining witness." (Pl.'s Resp. at 4). In support of his position, Cervantes refers to *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986), where the Supreme Court denied absolute immunity to a police officer for statements made in an affidavit for the purposes of obtaining an arrest warrant; the Supreme Court held that because the police officer's actions were analogous to those of a complaining witness at common law, absolute immunity did not apply. Id. at 340-41. In addition, Cervantes asserts that the Seventh Circuit implicitly recognized a complaining witness exception to the doctrine of absolute immunity in *Curtis v. Bembenek*, 48 F.3d 281, 286 (7th Cir. 1995), where it explained that a complaining witness is a party "who actively instigated or encouraged the prosecution of the plaintiff." (Pl.'s Resp., at 4). Cervantes contends that Jones is such a complaining witness and that, at most, Jones is entitled only to qualified immunity.

Jones, on the other hand, maintains that neither the Supreme Court nor the Seventh Circuit have definitively recognized the complaining witness exception to the absolute immunity doctrine. According to Jones, the Seventh Circuit in *Curtis* did not explicitly endorse a complaining witness exception to the rule of absolute immunity but simply observed that the "complaining witness theory is closely associated with the common law cause of action for malicious prosecution." 48 F.3d at 285. In *Curtis*, however, the court found that the plaintiff did not set forth a cause of action for malicious prosecution because he did not allege

that the underlying criminal proceeding concluded in his favor; as a result, the *Curtis* court held that the plaintiff's "reliance on the complaining witness theory [wa]s therefore inapplicable." Id. at 286.

In the present case, however, this Court finds that Cervantes has sufficiently alleged a claim for malicious prosecution. Moreover, the Court agrees with Cervantes that courts have denied absolute immunity to complaining witness defendants and have permitted malicious prosecution claims against them. *See, e.g., Tribblet v. Sanchez,* 1997 WL 106303, at *4 (N.D.Ill. Feb. 12, 1997); *Green v. Saenz,* 812 F.Supp. 798, 800-01 (N.D.Ill. 1992); *Anthony v. Baker,* 955 F.2d 1395, 1401 (10th Cir. 1992); *White v. Frank,* 855 F.2d 956, 958-59 (2d Cir. 1988). These courts draw a distinction between those witnesses who "played a role in initiating a prosecution" and those "whose role was limited to providing testimony." *White,* 855 F.2d at 958-59; *Green,* 812 F.Supp. at 800. An officer in the former role is akin to a complaining witness and is not absolutely immune for his grand jury testimony if "the testimony is relevant to the manner in which he initiated or perpetuated the prosecution of the plaintiff." *Anthony,* 955 F.2d at 1401.

For the purposes of a motion to dismiss, the Court must accept as true Cervantes's allegations that Jones presented false testimony before the grand jury and that this evidence was the only basis and the sole cause of Plaintiff's indictment for capital murder and three years of incarceration. Thus, this Court concludes that if, in fact, Jones acted as a complaining witness and initiated a baseless prosecution against Cervantes, he is not entitled to absolute immunity for his testimony before the grand jury. Accordingly, Defendant's motion to dismiss Plaintiff's claims on the grounds that Jones's testimony is protected by absolute immunity is denied.

B. Fabrication of Evidence Cervantes also bases his Section 1983 cause of action on Jones's alleged fabrication of evidence--namely, Jones's claim that Cervantes made an inculpatory oral admission regarding the murder of Laverne. Cervantes argues, relying on *Jones v. City of Chicago,* 856 F.2d 985 (7th Cir. 1988), that Defendant's conduct of deliberately supplying false information that resulted in Plaintiff's arrest, incarceration and prosecution is actionable under Section 1983. Defendant, not surprisingly, disagrees.

In *Jones,* the plaintiff alleged that the defendant police officers systematically concealed from the prosecutors and misrepresented to them, facts highly material to--or likely to influence--the decision whether to prosecute the plaintiff. Id. at 993. The Seventh Circuit recognized the officers' alleged wrongdoing as actionable under Section 1983, stating that "a prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial--none of these decisions will shield a police officer who deliberately supplied misleading information that influenced the decision." Id. at 994. The Seventh Circuit further discussed its holding in *Jones* in *Buckley v. Fitzsimmons,* 20 F.3d 789, 796-97 (7th Cir. 1994), stating: [E]vents not themselves supporting recovery under §1983 do not become actionable because they lead to injurious acts for which the defendants possess absolute immunity. *Jones [v. City of Chicago]* discusses both parts of the proposition. Jones alleged that the police had fabricated evidence, deceiving the prosecutor into filing criminal charges that the prosecutor never would have initiated had he known the truth. A prosecutor would have received absolute immunity, [] but the police who bilked the prosecutor were liable for the injury their deceit caused.

Here, construing Plaintiff's Complaint liberally in the light most favorable to him,[1] this Court concludes that Plaintiff has sufficiently alleged the type of claim recognized as actionable under Jones. Cervantes alleges that after Defendant failed to obtain evidence to link Plaintiff with Laverne's death he fabricated evidence that caused Plaintiff to be charged with her murder, and that, without Defendant's made-up story, there was no probable cause for the initiation of any criminal proceedings against Plaintiff. Therefore, Plaintiff's claim, essentially, is that as a result of Defendant's fabricated evidence, prosecutors filed criminal charges against Plaintiff that they would not have otherwise initiated. Such a claim, at this point at least, is cognizable under Section 1983.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss Plaintiff's Complaint is denied in its entirety.

ENTER:

/s/ George M. Marovich
United States District Judge

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1. allegations of fabrication of evidence and perjury before the grand jury involve fraudulent conduct and, therefore, must satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). (Def.'s Reply, at 2). However, because Defendant waited until his reply brief to raise this argument, this Court declines to consider it. *See Wilson v. O'Leary*, 895 F.2d 378, 384 (7th Cir. 1990) (court may refuse to consider arguments withheld until the reply brief); *Doe v. Board of Educ. of Hononegah Community High Sch.*, 833 F.Supp. 1366, 1380 n. 4 (N.D.Ill. 1993).

IN THE CIRCUIT COURT
FOR THE 16TH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	
-vs-	)	No. 93 CF 352
JAMES J. CERVANTES,	)	
Defendant.	)	

REPORT OF PROCEEDINGS had at the meeting of the Kane County Grand Jury, at the Kane County Courthouse, Geneva, Illinois, on the 16th day of March, A.D. 1993, at 1:00 P.M.

PRESENT:

Mr. David E. Akemann,
State's Attorney of Kane County, by
Mr. John A. Barsanti, Assistant State's Attorney
appeared for the People of the State of Illinois.

[2]

MR. BARSANTI: This is People versus James J. Cervantes, charged with the offense of first-degree murder. The Grand Jury has the right to subpoena and question any person against whom the State's Attorney is seeking a Bill of Indictment, or any other person, and to obtain and examine any documents or transcripts relevant to the matter being prosecuted by the State's Attorney.

LARRY JONES called as a witness herein, having been first duly sworn, was examined and testified as follows:

EXAMINATI0N

By Mr. Barsanti

Q. Would you state your name and spell your last name, please.

A. My name is Larry Jones, J-o-n-e-s.

[3]

Q. You're a South Elgin police officer; is that right?

A. That's correct.

Q. And were you involved in the investigation of the death of one Sally Lavergne, L-a-v-e-r-g-n-e?

A. Yes, I was.

Q. And Sally Lavergne was found deceased on what date?

A. She was found deceased on July 20, 1992.

Q. And was an autopsy performed?

A. Yes, it was.

Q. What was the cause of her death?

A. Her cause of death was caused by stab wounds to the chest and abdomen. And then there was also severe head trauma caused by blunt trauma to the head.

Q. Did you observe photographs of the body when it was at the morgue?

A. Yes, sir, I did.

Q. Were there multiple severe wounds in her head?

A. Yes, sir. I was also present at the [4] morgue during the autopsy.

Q. Is there some thought of what caused these wounds?

A. Yeah, they were caused by what appeared to be a large glass ashtray. It was kind of an amber color, very large. We recovered a small piece of it at the scene, not the

remainder of the ashtray.

Q. Witnesses would indicate there was such an ashtray in the apartment?

A. That's correct.

Q. Theoretically, at this point you're guessing at this, but she was struck many, many times in the head with that?

A. Oh, it would be many times. It caused four compressed skull fractures along with a massive ripping of the flesh on the side of her head.

Q. And then she was also stabbed?

A. That's correct.

Q. Where?

A. She was stabbed two times in the throat, one on each side. And there was five other stab wounds. They were deep thrusts to the [4] body with a butcher knife remaining in one of them.

Q. So this body was then found. Neighbors had indicated that no one had seen her, her friends, and then that she had been missing and then her apartment was examined; is that correct?

A. No, that's not correct.

Q. How did it happen?

A. A neighbor across the hall — she lived in a six-flat building — had reported that her clock radio had been playing very loud for a long amount of time. He knew she lived alone. He'd stepped across the hallway. He saw that her door was ajar, and he didn't want to go in there. He went back and called the police.

Q. So then when the police arrived, they knocked, without getting any answer, and observed the same things, the clock radio, the door being ajar, and you entered?

A. Yes.

Q. The body was laying on the couch in her living room?

A. That's correct.

[6]

Q. Was it in a state of undress at that time?

A. It was.

Q. Can you describe that?

A. Yes. She had — I could have best described it as a sleeper shirt. It would be like a long-length T-shirt. And that was the only thing she had on. It was pressed up bunched in her armpits and I believe it was the right breast that was visible.

Q. Did she have any other undergarments on?

A. No, she did not.

Q. So other than this T-shirt, she was nude?

A. That's correct.

Q. And then there was a knife sticking out of her torso area when she was found?

A. Yes.

Q. Lying on her back?

A. Yes, sir.

Q. Was there a great deal of blood?

A. Oh, yes, sir. Not much blood from the [7] stab wounds, but a great amount of blood from the head wounds. It was enough that it had soaked through the couch and was puddled on the floor underneath the couch.

Q. Was there blood evidence in any of the other rooms?

A. Yes, there was.

Q. Specifically the bathroom?

A. There was blood evidence.

Q. What was in there?

A. There was blood spots that lead into the bathroom. There was blood in the — it was like — it appeared to be water-diluted blood in the bath tub. And then there was also some blood spots on the toilet seat.

[7]

Q. Did it appear to you at the scene that someone cleaned themselves up?

A. Yes, sir, it did.

Q. Now, did there appear to be fingerprints or palm prints or handprints on the toilet?

A. There appeared to be at least a smudge of blood like a fingerprint on the bottom of the toilet seat.

Q. Now then, your investigation began. Did you come to James Cervantes, the defendant here, as a possible suspect?

A. Yes, I did.

Q. How did you come upon him?

A. Well, his name was mentioned to us by many people who were familiar with the victim. He was described sometimes as a boyfriend of hers, as a friend. And a couple of neighbors felt that he was a person that just hung around and took advantage of her.

Q. Now, was she normal?

A. No, she wasn't normal. She was a bit eccentric and not necessarily retarded, but I would consider her a bit off center in her behavior.

Q. So that was something that people knew about her, as maybe someone that somebody could take advantage of?

A. That's correct.

Q. Now, did you then start your investigation as to Mr. Cervantes? Could you describe for the Grand Jury what was their relationship like?

[8]

A. Their relationship, when I talked to him the first time, was very close friends. it was a strange relationship. He is married. He would use her apartment to meet a woman he was having an affair with. He would also stay at — I'm sorry — use her apartment, meaning Sally Lavergne's apartment. He would also stay at Sally Lavergne's apartment on his own without the meeting of the girl. He apparently would have sex with Sally Lavergne. It was a very strange thing that — his comings and goings.

Q. So, in other words, early on you spoke to Mr. Cervantes?

A. Yes, I did.

Q. And he denied any knowledge whatsoever?

A. That's correct.

Q. Did he give himself an alibi?

A. Yes, he did. It appeared that the death had taken place sometime during the night, late evening of the 19th to the time of about 6:36 a.m. on the 20th. But it wasn't very close to that because the blood puddled wasn't that fresh.

[10] He said that he had on the 19th, which would have been a Sunday had left his apartment that he shares with his girlfriend and had done some shopping, had gone to his mother's house in South Elgin. And then he had come back to the apartment that he shares with his girlfriend at about 5:30, and he had not left the apartment after that.

Q. Which would — and if that was actually true, then he could not have been the person that killed her?

A. That's correct.

Q. Because she was seen at — what was the last point she was seen?

A. Approximately 9:45 p.m. she left a restaurant in South Elgin.

Q. So 9:45 p.m. was the last time she was seen, and her body was discovered the next morning?

A. That's correct.

Q. Now, you indicated that — it's a little confusing. But he was married early in this relationship and used her apartment as a point where he could meet his girlfriend. But [11] later on he left his wife and moved in girlfriend?

A. That's correct.

Q. And that was the situation at the time of her death, Sally Lavergne's death?

A. That's correct. He was estranged from his wife and living with the girlfriend that he used to meet at the victim's house.

Q. Now, did you inquire with the girlfriend as to the truthfulness of this alibi he gave himself?.-

A. Yes, I did.

Q. What's the girlfriend's name?

A. Her name is Penny Newman, N-e-w-m-a-n.

Q. What did she say?

A. She concurred with what he had said. She was she said that he had gone a few times. She had a friend at her house on the 19th of July and t ha t James had left several times. But when he. did, in fact, return at 5:30 he had not left after that.

Q. Did you ask his mother?

A. Yes, I did.

[12] Q. What did she say?

A. She said that she had not seen him. I actually spoke to his mother before I talked to James. She told me that she had not seen him for quite a long time and that he didn't come to her house on weekends because she works strange hours.

Q. So she indicated that she did not see him on the 19th?

A. That's correct.

Q. Then your investigation continued; is that correct?

A. That's correct.

Q. Now, at some point in time did you interview people at the restaurant where she would normally eat and where she ate that night prior to her death?

A. Yes, I did.

Q. And did anybody there give you any information about the nature of the relationship between Cervantes and the deceased?

A. Many of the waitresses and operators of the restaurant remembered the victim. She ate [13] almost all of her meals there.

They remembered that there was a younger man than her — she was 48 at the time of her death and he was a Hispanic, kind of small build with glasses — that would come in occasionally when she was there and visit with her and that the victim spoke about this man quite a bit.

Q. Did you do any identification procedure to determine if who they were talking about was Cervantes?

A. No, I did not.

Q. But you assume that to be the case?

A. Yes.

Q. Because that fit his description?

A. That's correct.

Q. What did she say about him?
A. I'm sorry?

Q. What did the witnesses say Sally Lavergne said about Cervantes?
A. She sometimes referred to him as a friend, sometimes as a boyfriend. She remarked how she would get up early to give him rides to the train station because he has no driver's license. Things like that.

[14]

She would just — she was sometimes mysterious and sometimes rather gushing about her relationship with him.

Q. On the day of her death, the 19th of July, did she indicate that they'd had some argument?
A. No, that would have been the 17th of July.

Q. A couple days before?
A. A couple of days before. She was in that restaurant eating at the counter. The fellow that the witnesses described that fits the description of Cervantes came in. He and the victim moved over to — they left the counter and moved into a booth. They had a very quiet conversation, not very long. He left the restaurant. The victim came back and said — got to the counter and told the waitress that was waiting on her that he was mad at her.

Q. Did she say why?
A. She told them that she had told him he could not use her apartment anymore.

Q. This would have been on July 17?

[15]
A. That's correct.

Q. And, again, your investigation continues. At some point in time did you arrange for Cervantes to take a lie

detector test?

A. Yes, I did.

Q. And did he, in fact, come to the South Elgin police department and take that test?

A. Yes, he did.

Q. And did you receive the results of the test?

A. Yes, I did.

MR. BARSANTI: Now, keeping in mind for the purposes of the Grand Jury, I'd like to advise you that polygraphs are not admissible in trials in Illinois for any reason whatsoever.

BY MR. BARSANTI:

Q. But for purposes of this investigation, what was the results of the polygraph examination?

A. There were two questions that directly* related to his involvement in the death of Sally Lavergne that the FBI polygraph examiner felt he was deceptive about.

[16]

Q. Do you know what those questions were?

A. I don't know the particular wording, but one of them was did he do it and — did he kill her. And I don't remember the wording of the other, but it was along the same line. it was just a small variation from that.

Q. Indicating that he was being deceptive about his answer in those places?

A. That's correct.

Q. His answers were that he had nothing to do with it?

A. That's correct.

Q. After that particular polygraph examination when it was all finished, did you then offer to drive him home?

A. Yes, I did.

Q. And did you?
A. Yes.

Q. What time of the day or night was it?
A. Actually, I didn't offer. He requested that I take him home.

Q. What time of the day or night was that?
A. It was about 5:00 in the morning.

Q. And he had been with the police for [17] some time at that point?
A. We had come into the police station, I would only guess it to be, about 11:30 or 12:00 midnight. But I had been — two other investigators and I had been talking to him at his home prior to that.

Q. Jumping back prior to the polygraph now, in your other conversations with him that day, had he changed his original story?
A. Yes, he had.

Q. What did he change it to?
A. He initially when I was there talking to him by myself earlier in the evening, he told me that he would not go to the police station with me; that he didn't want to talk to the police. Well, actually, not that he didn't want to talk to the police, his attorney had told him not to talk to the police. He didn't tell me he didn't want to. But he wasn't sure what he should do.

He invited me to sit and talk with him for a while. He was sharing with me that the relationship with the girlfriend he lived with was falling apart; that he had physically abused [18] her. She had moved out from him; and that also has a severe drinking problem. And during the course of the conversation, he told me that he can't control his temper when he's drinking, and it's caused him problems with other

girlfriends that he's he and that. So I left.

I came back later with two other investigators and we talked again. And at that time he said that he would not mind talking to the police about it; he just did not want to leave his apartment to do it.

So we sat down. And during that time we were kind of talking to him about some of the things that didn't seem to follow. There had been some changes in statements from the beginning.

When I talked to him on the 20th, he told me he had no keys to the victim's apartment. When I talked to him on the 25th of July, he gave me a key to the victim's apartment saying he had just thought about it, that he still had that. We talked about that.

I talked to him about his mother saying, [19] he had not been there that day. He said that he did not remember; that he may have, in fact, not told me the truth when he told me that.

He told me at that time that he had abused the victim in the past. We had witnesses that said she had bruises and at one time a black-eye from abuse from him.

He said that he had abused her before, but he didn't think that it led to those bruises that we had seen. It was more along that same line when we talked.

We went back and we had talked to many girlfriends of his that had been abused. One of them was pregnant with his child, and she had made a police report before that he had abused her.

Q. When you say abused, you mean physical abuse?

A. Physically abused her, yes, like hitting and kicking.

Q. So what you're able to determine on this interview and subsequent interviews was that he, in fact, did have a key, which he told you he didn't before?

[20]

A. That's correct.

Q. And he, in fact, admitted that he might have lied to you originally about where he had been during the time?

A. That's correct.

Q. And, also, you were able to determine that he was, in fact, physically violent towards his girlfriends?

A. That's correct.

Q. And, in fact, had been physically violent towards her?

A. That's true.

Q. Through his own admission?

A. Yes.

Q. Then he went to take the polygraph and you testified about that already. I want to get to when you're driving him home. Did you have a conversation with him then?

A. Yes, I did.

Q. Could you tell the members of the Grand Jury what you said and what he said?

A. Yes.

I was driving him home and — James [21] Cervantes grew up in South Elgin. I've probably known him about 20 years.

And I was driving along and he seemed rather deep in thought. He was looking out the window. And I said to him, "It seems to me like you would like to admit what you've done, get it out of the way, get the punishment that you deserve for doing it and get started with the rest of your

life.''

Q. Stop there for a moment. I want to point out for the record that, of course, he was not in custody at this time.'

A. No. He had asked me to drive him home.

Q. In fact, you were driving him home?

A. Yes, sir, I was.

Q. And after you said that, did he respond?

A. Yes, he did.

Q. What did he say?

A. He said, ''Yes, I would like to do that.'' And I looked over at him and he said, ''But I've got too much too lose.'' And so I drove — we probably rode together another two minutes and then he looked [22] at me and said, ''If I admit I killed Sally, what would my defense be?'' And I just remarked to him that it would give him a chance to tell people about his drinking problems and about his prior abuse problems and that it would also give him a chance to tell people a part of it that he would have seen from being there instead of what we saw from being there. When I dropped him at his apartment, he told me he did not remember everything that had happened. But he was going to try and remember everything and he would get back in touch with me.

Q. Now, did he ever make a comment to you concerning the prints on the toilet?

A. No, he made that comment to the FBI polygraph examiner.

Q. During the exam?

A. It was a post-exam interview.

Q. Relate that to the members of the Grand Jury.

A. During the post-exam interview, the FBI polygraph examiner — they kind of go through an interview of the subject when they're done with [23] them.

During that interview, James Cervantes had told the polygraph examiner, Special Agent Hanna, that he had, in fact, been at a park near Sally Lavergne's house the night she was killed and that he had been drinking heavily and smoking pot; that he thinks he remembers approaching her building. Again, it was a six-flat. But he does not remember going in there.

And when shown a picture of the toilet seat in an upright position with the bloody smear-type fingerprint underneath, he told Special Agent Hanna that that might be his fingerprint.

Q. Now, there was one other aspect I wanted to talk about is the key. Now, there was a key found in the apartment; is that correct?

A. Yes. Her apartment had a dead bolt on the top and what I would consider a snap lock on the doorknob.

Q. So you need two keys?

A. That's correct.

Q. And inside the apartment, did you find [24] one of the keys?

A. I found a key to the snap lock. It was on — as you come in the apartment door, as you come in this way, once you're in the apartment, there's about a five-shelf bookshelf here. And the key to the snap lock was on the second shelf right by the door.

Q. And the key that he gave you was the key to the dead bolt?

A. That's correct.

Q. Did you find her keys there, also?

A. Yes, I did.

Q. A set of her own keys?

A. Yes.

Q. Now, for physical evidence, scientific evidence, was she raped?

A. No, she was not.

Q. So there was no rape kit evidence that you could use to determine that?

A. That's correct.

Q. Now, was a fingerprint analysis done of the apartment including the toilet seat?

A. Yes, it was.

Q. And were you able to make any latent [25] lifts; in other words, lifts which would be suitable for comparison with somebody?

A. The State Police crime scene technician attempted several lifts and also sent items to the State Police Crime Lab to be processed under a more perfect condition. We got no latents suitable for comparison at the scene.

Q. And since they sent that, nothing came up either; is that correct?

A. That's correct.

Q. That would have been back in July or August?

A. That's correct.

Q. Any other information or evidence that you've developed other than what we've talked about?

A. No. I'm not sure if — one of the things I mentioned during my conversation with James Cervantes was he also had — I'm sorry. One of the other things we had found out, there was a girl that was visiting Penny Newman the day that the — on the Sunday that [26] this might have occurred that we located who lives over in Palatine. We had talked to her. And, I'm sorry, without my report I can't remember her name. I'm sorry.

She had been present and was a very good friend of Penny Newman's. They were childhood friends. One of the

things she remembered was that Penny Newman had said when James came back that he had talked to his mother and she was going to help him with his divorce. And the friend felt that she was financially going to help with the divorce.

She also remembered that on that day Penny Newman had said to her that that night she and James were going to visit a friend of James, named Sally.

Now, later on when she was talking to Penny, Penny had remarked that another officer- and I were there talking to them about a murder and it was a friend of James' named Sally. And the friend remarked to her "Isn't that the same person you were going to go see that night?" And she said, "Yes, but we didn't go. James was too tired."

[27]

And also when I talked to James about money, he had told me that he many times borrowed money from Sally and there were some times he never paid her back.

Q. Put this in a little bit of perspective at this point in time. Let me run through some of these points and you can agree or not if this was the case.

James Cervantes and the deceased had a personal relationship and he did, in fact, have a key to her apartment? A. Yes, he did.

Q. In fact, both keys. Did he indicate that?

A. At one time he had both keys so he could come and go whenever he wished.

Q. And one of those keys was found in the apartment at the time of the murder?

A. That's correct.

Q. And then there's witnesses who would testify that Sally Lavergne complained of and showed evidence of being physically abused by James Cervantes in the past? A.

Yes.

[28]

Q. And that he had admitted that?
A. Yes.

Q. James Cervantes admitted that he, in fact, has physically abused women, including Sally Lavergne, in the past?

A. That's correct.

Q. And that he had an uncontrollable temper when he drinks?

A. That's correct.

Q. James Cervantes then gave an alibi concerning that he spent some time with his mother the day of the 19th when his mother indicated that that was not the case?

A. That's true.

Q. He did not go over there that day?
A. That's correct.

Q. And there was some information that James Cervantes and his girlfriend were going to visit Sally that night that had been commented on earlier in the day?

A. That's correct.

Q. And the last time that Sally was seen alive was about sometime before 10:00 p.m. on the night of the 19th?

[29]

A. That's correct.

Q. And she was found deceased around 6:00 a.m. the next morning?

A. Approximately 6:36, yes.

Q. And there was no forced entry into this apartment; is that correct?

A. That's correct.

Q. Has your investigation showed that Sally Lavergne had any other relationships with any other men?

A. We found nothing in recent times, no.

Q. Was anything stolen?

A. Not that we could find.

Q. And you did find one of the keys was still in the apartment? I think you said that.

A. Yes.

Q. There was blood and apparently a fingerprint which was not suitable for a comparison found on the toilet seat?

A. Yes.

Q. And had James Cervantes indicated that that might be his print?

A. That's correct.

Q. And James Cervantes indicated that he [30] had been in the park near her building that night?

A. That's correct.

Q. And that he had been drinking and smoking marijuana?

A. Correct.

Q. And he remembers approaching her building?

A. He said that he may have approached it.

Q. He may have approached the building?

A. Yes.

Q. And he said the fingerprints on the toilet seat might be his?

A. That's correct.

Q. This all occurred in Kane County?

A. Yes.

MR. BARSANTI: Do you have any other questions?

A JUROR: I have a number of questions.

No fingerprints available on the knife?

THE WITNESS: No. It actually appeared it could have been wiped clean while it was in her.

[31]

A JUROR: Anything under the victim's nails to —

THE WITNESS: Well, there were some fibers in her hands. There was nothing under her nails, but there were defense wounds on her hands that did not appear to be made by the knife. They had- more jagged edges that looked more like they were to push away from the blunt trauma that was happening to her.

A JUROR: How soon after her body was found was Cervantes questioned or talked to?

THE WITNESS: Okay. Her body was found at 6:36 a.m. on the 20th, and I talked to him approximately 11:30 p.m. on the 20th.

A JUROR: Was any effort made — and I don't know if you even could have done it legally at this time — to look him over to see if he had any scratches or bruises, or did you see any marks?

THE WITNESS: Well, I certainly had tried to do that as much as I legally could. He was in bed when I went — when I finally found where he lived, it was very late. He and his girlfriend were both in bed and I, in [32] fact, interviewed him in front of her. I saw no marks on him.

A JUROR: What about any bloody clothing of his; nothing was ever recovered from his trash or

THE WITNESS: No, no. I would say that other than the fact that his mother saying that he didn't — that she hadn't seen him — by the time I took him — when I talked to him

on the 20th, I would not say I totally focused on him.

I mean, it's a big apartment complex, and my initial talk with him was not something I immediately focused on him as the total suspect.

A JUROR: None of the neighbors heard screaming or yelling when this was — this murder was taking place?

THE WITNESS: No. I think I'd like to — maybe I could best describe it to you. It's not a subsidized apartment complex. But I would call it a middle to low middle class apartment complex where there's a great deal of noise in those six flats all the time.

[33]

And I think the people there build up a certain noise tolerance. Like the lady upstairs says, "I hear her alarm clock every morning, but I don't pay attention to whether it gets shut off or not."

MR. BARSANTI: Anybody else?

A JUROR: You said that, I believe, that the ashtray you believe was used as a blunt trauma instrument. Was that never recovered you said?

THE WITNESS: It's never been recovered. We found a piece about that size. It was like in her hair, matted in her hair.

A JUROR: And you couldn't account for how that disappeared or —

THE WITNESS: Well, we can only account for the fact that the offender would have had to take it with him.

A JUROR: When you recovered the key in the apartment, did you check that for fingerprints?

THE WITNESS: No, I did not. Actually, I was inventorying the apartment, and I was looking and there were many keys. By the time I tried to — I mean not in that particular — but through the place. And [34] I'm afraid that once I

found that it actually fit the door, I had already — I was the one who tried it on the door. I felt it had no evidentiary value.

A JUROR: Did James ever give any indication why his mother didn't back him up? Did he come up with some other story as to where he was or —

THE WITNESS: No. He only told me that he may not have told me the truth when he told me that. That was it.

A JUROR: What was the age difference between him and the victim?

THE WITNESS: I would guess his age at the time of the murder at 31, and she was 48 at the time. I think he may have turned 32 now, but I believe that he was 31 at the time; she was 48.

MR. BARSANTI: Anybody else? (No response.)

(Which were all the proceedings had in said matter on said date.)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES J. CERVANTES,

Plaintiff,

No. 97 CV 1520 *v.*

LARRY JONES,

Defendant.

SWORN STATEMENT OF JAMES CERVANTES

The undersigned, under penalties of perjury, cer- tifies that the following statements are true:

1. My name is James Cervantes. I am the plaintiff in Cervantes v. Jones, 97 CV 1520.

2. My first conversation with defendant Jones about the Sally Lavergne homicide was on July 19, 1992.

    a. Jones did not at any time during that conversation ask me if I had had a sexual relationship with Sally Lavergne.

    b. I told Jones that I had had a key to Sally's apartment and that I believed that I had returned the key.

    c. I also told Jones that I had not seen Sally for about two or three days before her death. I am aware that Jones claims that I told him that that I had not seen Sally for two or three weeks. Jones is in error in this claim.

    d. I also told Jones that I had been to my mother's house in the afternoon of July 19, 1992 and that she had not been at home. I never told Jones

that I had seen my mother in the afternoon of July 19, 1992. I am aware that Jones claims that I told him that I had seen my mother in the afternoon of July 19, 1992. Jones is in error in this claim.

3. I do not have personal knowledge of whether Marguerite Lombardo told Jones that "Sally Lavergne [had] told Ms. Lombardo that the man was 'mad' at Sally because she had not told him that he could use her apartment anymore." I do know that I was not made at Sally when I spoke with her two or three days before her death. If the truth of this contention (paragraph 17 of defendant's 12(m) statement) is material to the motion for summary judgment, ruling on the motion for summary judgment should be deferred until I have had an opportunity to depose Ms. Lombardo.

4. Arlene Miller (referred to in paragraph 18 of defendant's 12(m) statement) was a homeless person who was known to be addicted to drugs. I believe that Ms. Miller's lack of credibility was known to Jones.

5. My second conversation with defendant Jones about the Sally Lavergne homicide was on July 25, 1992. Jones asked me, for the first time, whether or not I had had a sexual relationship with Sally. I truthfully answered this question by telling Jones that Sally and I had been intimate in 1990 and 1991 and that we had ended our sexual relationship in about October of 1991 but had remained friends thereafter.

6. On December 8, 1992, I again spoke with defendant Jones about the Sally Lavergne homicide.

    a. I did not tell Jones during this conversation that I have "difficulties controlling my temper when I drink." I am aware that Jones contends that I made such a statement during that conversation.

Jones is in error in this claim.

b. I told Jones that I had been drinking beer and smoking marijuana in the afternoon of July 19, 1992. I am aware that Jones contends that I told him that I had been drinking beer and smoking marijuana in the evening of July 19, 1992. Jones is in error in this claim.

c. I did not tell Jones that I "may have lied to the police about visiting my mother on July 19, 1992." I consistently told Jones that I had gone to my mother's house and that she had not been home. I am aware that Jones contends that I stated I "may have lied" about this. Jones is in error in this claim.

d. I did not tell Jones that I "may have lied about not having a key to the victim's apartment." I told Jones that I had found the key after our first meeting and that I had been mistaken about having returned the key to Sally. I am aware that Jones contends that I stated I "may have lied" about this. Jones is in error in this claim.

7. I never told Agent Hanna that I "had walked up to the victim's residence but did not remember going inside." (12(m) Statement, par. 36.)

8. I never told Agent Hanna that the fingerprint from the toilet "may have been [mine]." (12(m) Statement, par. 36.)

9. I do not have personal knowledge of conversa- tions between Jones and Barsanti about the my prosecution and, without depositions of Jones and Barsanti, I am unable to agree or to disagree with the contentions of paragraphs 41, 42, 44, 46, and 55 of defendant's 12(m) statement. If these contentions are material to the motion for summary judgment, I request that ruling on

the motion to continued until I have had a full and fair opportunity to depose Jones and Barsanti.

Dated: May 2, 1998

/s/ James Cervantes

(2)

Supreme Court, U.S.
FILED
DEC 15 1999
CLERK

No. 99-829

In the Supreme Court of the United States

JAMES J. CERVANTES,

Petitioner,

v.

LARRY JONES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether a §1983 action for malicious prosecution involving allegations of fabricated evidence and perjured testimony by a police officer may be maintained against that officer even though probable cause otherwise existed, the prosecutor unilaterally decided to initiate the prosecution based on information developed by five law enforcement agencies and did not consider the alleged fabricated evidence, and the officer was absolutely immune as a testifying witness?

Does a law enforcement officer lose his absolute immunity as a testifying witness merely by participating in a criminal investigation where a plaintiff claims the officer is a "complaining witness"?

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BRIEF IN OPPOSITION

Respondent Larry Jones respectfully requests this Court to deny the petition for a writ of certiorari which seeks review of the Seventh Circuit's decision.

OPINIONS BELOW

The Seventh Circuit's decision is reprinted in the appendix at A1-15 and is reported at 188 F.3d 805.[1] The district court's decision granting summary judgment is reprinted in the petitioner's appendix at A18-30 and is reported at 23 F.Supp.2d 885.

JURISDICTIONAL STATEMENT

The Seventh Circuit entered its decision on August 13, 1999. No rehearing was sought. The petitioner timely filed his petition for a writ of certiorari on November 12, 1999, which was docketed in this Court on November 15, 1999. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the Unites States Constitution provides:

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[1] The decision in petitioner's appendix ("Pet.App.") is inaccurately reproduced because the text of two footnotes is included in the main text. The decision is therefore reproduced in the appendix to this brief ("App.").

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 1983 (42 U.S.C. §1983) provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Petitioner's statement of the case omits certain facts relevant to the lower court's ruling. The facts recited by the Seventh Circuit are correct, many of which may be found in the affidavit of John Barsanti, the assistant state's attorney who prosecuted petitioner, and the FBI profile report. Both the affidavit and profile report are reprinted in the appendix to this brief (App. A16-37). However, there are additional factual points which should be noted.

In the district court, the only evidence which the petitioner claimed was fabricated was a statement made as respondent drove petitioner home after failing to pass a polygraph examination (App. A26-28). Accord-

ing to both petitioner's and respondent's recollections, petitioner's statement was a hypothetical, *i.e.*, that "if" he admitted or confessed to the crime, then what "would be my defense?" Petitioner answered interrogatories stating that this was his sole claim of fabricated evidence, and repeated that this was the sole claim of fabricated evidence in opposing respondent's summary judgment motion, although he raised other points in an affidavit (Dkt.12, Exh.2; Dkt.19, pp.2, 11-12; Dkt.20, Exh.7). When asked "what evidence you claim the defendant Larry Jones fabricated," petitioner answered:

> ANSWER: The claim that I had made inculpatory statements. Specifically, that I had had (sic) asked Jones why I should confess, and that I had then stated that "If I admit I killed Sally, what would my defense be?" I never made this statement.

(Dkt.12, Exh.2). What petitioner said, according to his testimony at the hearing on his motion to suppress, was: "I told him if I confess to a crime that I did not commit, what would be my defense? I got too much to lose" (Dkt.12, Exh.4, Tr. 74-75).

On appeal in the Seventh Circuit, and again in this Court, petitioner expanded his litany of alleged misstatements to include three additional statements that he claims he did not say: that he may have lied about being at his mother's that day; that he had difficulties controlling his temper when he drinks; and that he was drinking beer and smoking marijuana the night of the murder (Pltf's 7th Cir. Br. 4-5; Pet. 3).

Petitioner's affidavit submitted in opposition to the summary judgment motion did not fully contradict these three alleged misstatements. He did not deny that he ever told respondent that he had difficulty con-

trolling his temper when he drank. Rather, Cervantes denied that he said this during a particular conversation which took place on December 8, 1992 (Pet. App.61). Cervantes' girlfriends and ex-wife confirmed to the police that Cervantes abused them when drinking (App. A23, A25, A26).

Cervantes' sole quarrel with respondent's testimony that petitioner told him that he had been drinking beer and smoking marijuana the night of the murder was not that he never said anything like that, but that he told respondent that he had been drinking and smoking marijuana in the afternoon, not the evening (Pet.App. 62). Finally, petitioner did not contradict that he told the police that he had gone to his mother's house the day before the murder, but contradicted that he told them he had visited his mother. According to petitioner, he told the police that he had not visited his mother, but went to her house and she did not see him because she was not home (Pet.App. 62). In his affidavit, the petitioner described these three discrepancies as "errors" (Pet.App. 62).

The respondent did not explicitly tell the grand jury that the petitioner confessed to the murder of Sally Lavergne. Respondent testified to a conversation he had with petitioner at 5:00 a.m. as he drove him home, and that he told petitioner that it seemed like he "would like to admit what you've done, get it out of the way, get the punishment that you deserve for doing it and get started with the rest of your life" (Pet.App. 50-51). He testified that petitioner responded: "[Y]es, I would like to do that," but "if" he admitted to the killing, "what would my defense be?" (Pet.App. 50-51).

John Barsanti, the assistant state's attorney who prosecuted petitioner, testified that he did not rely on this conversation in deciding to seek an indictment because he found it to be equivocal (App. A28).

It is not true that there was no physical evidence linking the petitioner to the apartment where the murder occurred, as petitioner claims and the Seventh Circuit noted (Pet. 1-2; App. A14). Petitioner had a key to the apartment, and there was no sign of forced entry (App. A19, A24). Respondent was trying to obtain additional physical evidence when Barsanti decided to seek an indictment without it. Respondent had gone to Barsanti, the assistant state's attorney, to seek a warrant for hair and blood samples from petitioner (App. A16). Barsanti independently reviewed the information developed thus far in the investigation (App. A17). It showed, among other things, that petitioner was the victim's former lover, and he matched the description of the person seen with the victim at a restaurant several days before her murder (App. A22, A24). After the meeting, the victim told the restaurant owner that her friend was mad at her because she told him that he could not use her apartment anymore (App. A22).

Barsanti testified that he unilaterally made the decision not to seek a warrant for further evidence because he decided that there was sufficient evidence to take the case to the grand jury (App. A16-17). Barsanti also testified that respondent did not request, pressure, urge or attempt to influence him in this decision (App. A17, A31).

The Seventh Circuit correctly noted that there were DNA tests which did not match with either the peti-

tioner or the victim. However, those tests were not conducted until after the indictment (Dkt.20, Exh.3). Thus, the results obviously could not have been known to the respondent when he testified in front of the grand jury.

The Seventh Circuit also noted that Judge Doyle found that an FBI agent had lied under oath at the suppression hearing (App. A12 n.8). It did not comment on the fact that the same judge, the sole judge who heard both the petitioner and respondent testify to the disputed conversation, made a specific finding that respondent's testimony was credible (Dkt.12, Exh.1(C) p.9).

Finally, it must be noted that no less than five law enforcement agencies were involved in some aspect of the investigation, including the FBI, the Illinois State Police, and the police departments of St. Charles, South Elgin (of which respondent was a member), and West Dundee (Dkt.12, Exh.1; App. A17-18, A23-24). Multiple officers, including the petitioner, were involved in the investigation and in interviewing the various witnesses (App. A17-27).

The prosecutor explained that he decided to subpoena the respondent because he was familiar with all aspects of the investigation, but he could have just as easily subpoenaed any one of the law enforcement officers from the various agencies involved (App. A28-29). Only this respondent was subpoenaed and testified before the grand jury. Only this respondent was sued by petitioner.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

PETITIONER'S QUESTION DOES NOT WARRANT REVIEW BY THIS COURT

Petitioner argues that he has a remedy regardless of whether he can establish the essential elements of his Fourth Amendment malicious prosecution claim, including lack of probable cause, because he claims that respondent, a law enforcement officer, fabricated evidence and falsely testified to his conversation. According to petitioner, once he claimed the respondent lied, this entitled him to recover, even if the prosecutor disregarded the disputed conversation and otherwise had probable cause to seek an indictment. This record does not provide factual support for petitioner's arguments. Moreover, the law is established in this area and this Court's review is not warranted.

A. This Record Does Not Support the Claim That Respondent's Alleged Fabricated Evidence Was the Basis of the Prosecutor's Decision to Seek an Indictment Before the Grand Jury.

It should first be noted that this record does not support the claim that respondent fabricated evidence or testified falsely to the grand jury. Neither petitioner's nor respondent's version could be reasonably understood to be an explicit confession, but only presented a hypothetical scenario that "if" (or "in the event") that petitioner confessed, then what would his defense be.

Respondent's alleged false testimony before the grand jury was that petitioner told him: "If I admit I killed [the victim], what would my defense be?" (Pet.App.51). Petitioner's version was: "I told him if I confess to a crime that I did not commit, what would be my defense? I got too much to lose" (Dkt.12, Exh.4, Tr. 74-75). That the conversation took place was never disputed by petitioner. That there were discrepancies in how the petitioner and respondent remembered this conversation, which took place at 5:00 a.m., does not make this statement "fabricated" or respondent's testimony as to his memory of the conversation "false."

Not surprisingly, the prosecutor who made the decision not to seek a warrant for physical evidence from petitioner (as the respondent asked), testified that he thought respondent's report of petitioner's statement was equivocal and he did not rely on it in deciding to seek an indictment (App. A28). Thus, any discrepancy between the two versions did not create a genuine issue of material fact given the fact that the prosecutor disregarded the disputed statement in deciding to go to the grand jury.

This case was decided on a summary judgment motion, and there is no evidence to contradict the prosecutor's affidavit that he, and only he, decided not to seek a warrant for additional evidence (as respondent requested), but to seek an indictment before the grand jury. The prosecutor testified that respondent never suggested, pressured, urged or attempted to influence his decision to seek an indictment (App. A17, A31). There is no evidence that the prosecutor relied on the petitioner's "equivocal" statement. It is not enough that allegedly false information was given; the prosecutor

must be influenced by that false information for it to be actionable. *Wilkes v. Young*, 28 F.3d 1362, 1365 (4th Cir. 1994), *cert. denied*, 513 U.S. 1151 (1995); W. Prosser, LAW OF TORTS, §119 at 837 (4th ed. 1971).

Liability under §1983 requires a causal connection between the alleged acts taken in violation of a plaintiff's rights and the harm. *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658, 692 (1978) (citing *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976)). Here, there was no causal connection because the prosecutor alone decided to seek an indictment without considering the disputed statement.

B. Whether a Testifying Witness Is Absolutely Immune for His Testimony in a Judicial Proceeding Is a Settled Area of Law.

The question then becomes whether respondent is subject to liability for his grand jury testimony. Petitioner argues that simply because he claims respondent testified falsely, he has a right to recover under §1983 (Pet. 4). Yet, this Court has expressly held there is absolute immunity for a testifying witness, even if the alleged testimony is false or the witness commits perjury. *Burns v. Reed*, 500 U.S. 478, 489 (1991) (citing *Briscoe v. LaHue*, 460 U.S. 325, 332 (1983)). Testifying witnesses are absolutely immune from liability under 42 U.S.C. §1983. *Briscoe*, 460 U.S. at 334-41.

The reason for according absolute immunity for testimony in a judicial proceeding is not out of deference for the public official. Rather, "the dictates of public policy which requires that the paths which lead to the ascertainment of truth should be left as free and unobstruct-

ed as possible." *Id.* at 332-33 (quoting *Calkins v. Sumner*, 13 Wis. 193, 197 (1860)). If witnesses were not absolutely immune, they would engage in self-censorship, shading their testimony in fear of liability, *Briscoe*, 460 U.S. at 333. "Absolute immunity is designed to free the *judicial process* from the harassment and intimidation associated with litigation." *Burns v. Reed*, 500 U.S. 478, 494 (1991) (citing *Forrester v. White*, 484 U.S. 219, 226 (1988)). Police officers, just like lay witnesses, are absolutely immune for their testimony. *Briscoe*, 460 U.S. at 335-36. A particular concern arises with police officers because they testify in "scores of cases every year, and defendants often will transform resentment at being convicted into allegations of perjury by the State's official witnesses." *Briscoe*, 460 U.S. at 343-44 (quoted in *Jones v. Cannon*, 174 F.3d 1271, 1286 (11th Cir. 1999).

It is now well established that this Court utilizes a "functional approach," in which a court looks to "the nature of the function performed, not the identity of the actor who performed it" to determine if there is immunity. *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993) (quoting *Forrester*, 484 U.S. at 229). *See generally Burns*, 500 U.S. at 486 (collecting cases). It is under this "functional approach" that respondent's role in this case must be examined. First, he was one of several officers from five law enforcement agencies who investigated the murder. There is no evidence that he instigated the prosecution. Rather, at the point the prosecutor unilaterally decided to take the case to the grand jury with the information developed to date, the respondent was seeking a warrant to obtain additional evidence. Respondent's second function was to testify in front of

the grand jury after the prosecutor decided to subpoena him of all the officers. Respondent is absolutely immune because he was sued for his grand jury testimony, regardless if it was false and regardless of the other hats he wore during the investigation.

This Court has clearly established that a functional test is to be utilized, *i.e.*, what was the function of the defendant when he purportedly violated the plaintiff's constitutional rights. *Burns*, 500 U.S. at 486 (collecting cases applying a functional approach); *Briscoe*, 460 U.S. at 342. *See also Kalina v. Fletcher*, 522 U.S. 118, 134-35 (1997) (Scalia, J., concurring). Here, respondent was a testifying witness before a judicial tribunal. A police officer who testifies at a judicial proceeding is, like all witnesses, absolutely immune, even if he commits perjury. *Briscoe*, 460 U.S. at 335-36.

In *Briscoe,* this Court held that law enforcement officers are absolutely immune from liability for their testimony at a criminal trial. In *Malley v. Briggs*, 475 U.S. 335 (1986), this Court confirmed that testifying witnesses are absolutely immune, although it rejected absolute immunity for an officer who allegedly perjured himself in a warrant application. It affirmed that it had "interpreted §1983 to give absolute immunity to functions "intimately associated with the *judicial* phase of the criminal process, . . . because any lesser degree of immunity could impair the judicial process itself." *Malley*, 475 U.S. at 342-43 (citing *Briscoe*, 460 U.S. at 334-35).

The question posed by the petitioner does not present an unresolved question nor does it warrant this Court's review. This Court squarely held in *Briscoe* that testify-

ing witnesses are absolutely immune from liability. It has reaffirmed *Briscoe* and recognized that testifying witnesses are absolutely immune "even if the witness knew the statements were false and made them with malice." *Burns*, 500 U.S. at 489 (citing *Briscoe*, 460 U.S. at 332).

This Court has examined the scope of absolute immunity under various factual scenarios. *Kalina v. Fletcher*, 522 U.S. 118 (1997) (holding that a prosecutor was absolutely immune for prosecutorial functions, but not immune where sued for investigative, non-prosecutorial functions); *Buckley*, 509 U.S. at 274, 278 (holding that a prosecutor does not perform a prosecutorial function and is not absolutely immune when he fabricates evidence or holds a press conference but would only be protected by qualified immunity); *Burns*, 500 U.S. at 487 (holding that a prosecutor is absolutely immune for appearing at a probable cause hearing as the lawyer for the State, but not absolutely immune for giving legal advice to the police because it is not so "intimately associated with the judicial phase of the criminal process," citing *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)); *Forrester*, 484 U.S. 219 (holding that although judges are absolutely immune when performing judicial duties, they are not absolutely immune when performing administrative tasks); *Malley*, 475 U.S. 335 (holding that a police officer whose request for a warrant resulted in an unconstitutional arrest because the affidavit failed to establish probable cause was not absolutely immune). This Court has provided sufficient guidance regarding the scope of absolute immunity.

C. This Court Has Held That There Is No Civil Remedy Where a Person Is Absolutely Immune and this Question Does Not Warrant this Court's Review.

Petitioner's question presented for review is whether a person is left without a remedy if a defendant presents false evidence to a grand jury. This Court has already (and repeatedly) answered this question. Not having a civil remedy is the necessary result when a person has absolute immunity. *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976); *Briscoe*, 460 U.S. at 345 (absolute immunity "bars one possible avenue of redress").

The reason absolute immunity is recognized is because the broader public interest outweighs the individual's interest. Public policy demands that a person who performs a certain function, whether as a witness or a judge or a prosecutor, must be able to conduct himself without fear of personal liability. *Briscoe,* 460 U.S. at 333, 343-45; *Imbler*, 424 U.S. at 427-28. Although this may deprive some individuals of a civil remedy, there are other checks and balances in the judicial system. *Briscoe*, 460 U.S. at 340. Witnesses can be criminally prosecuted for perjury, prosecutors face sanctions against their bar licenses, and prosecutors and judges can be charged criminally for wilful deprivations of constitutional rights. *Imbler*, 424 U.S. at 429. This Court has already determined that nothing in the legislative history of 42 U.S.C. §1983 shows that Congress intended to provide a damages remedy against any witness, including police officers. *Briscoe*, 460 U.S. at 341.

Briscoe recognized that there was the possibility of unjust convictions if officers perjured themselves, but still held that law enforcement officers were absolutely

immune for their testimony. *Briscoe*, 460 U.S. at 345. Petitioner's question presented for review is one which this Court has already answered and does not call for this Court's discretionary review.

D. There Is No Question That Probable Cause Existed and That the Prosecutor Did Not Rely on the Alleged False Evidence in Deciding to Present the Question to the Grand Jury.

It is well established that probable cause is an essential element of the plaintiff's malicious prosecution claim. The Seventh Circuit correctly held that a plaintiff "alleging malicious prosecution under §1983 must create a genuine issue of material fact as to each element of this constitutional tort," including the essential element of probable cause (App. A4, A15). Petitioner cannot cure his failure to establish all elements necessary to establish his malicious prosecution claim by challenging the veracity of the officer's testimony or labeling it "false."

Unquestionably, lack of probable cause is an essential element of the petitioner's malicious prosecution claim brought under the Fourth Amendment, which on its face prohibits seizure of persons or things without "probable cause, supported by Oath or affirmation." U. S. CONST. amend. IV; *Kalina*, 522 U.S. at 129; W. Prosser, LAW OF TORTS, §119 at 835 (4th ed. 1971). The facts set out in the prosecutor's affidavit and the Seventh Circuit's decision establish there was not a lack of probable cause (App. A1-37).

There was a plethora of evidence from various witnesses developed by five different law enforcement agencies which established probable cause, *i.e.*, that the facts and circumstances within the official's knowledge and of which he had reasonably trustworthy information at the time were "sufficient to warrant a prudent man in believing" that petitioner had committed the murder. *Hunter v. Bryant*, 502 U.S. 244, 228 (1991). The prosecutor reviewed all the evidence, disregarded the petitioner's equivocal statement, and independently determined there was probable cause.

The premise of petitioner's argument is that his failure to establish probable cause, an essential element to his claim, is not fatal to his case as long as he contends that the officer lied. Regardless of how vehemently petitioner labels the evidence "false" or "fabricated," it has long been established by this Court that it is a plaintiff's burden to establish all of the essential elements to his case when faced with the motion for summary judgment. *Celotex, Inc. v. Catrett*, 477 U.S. 317, 324 (1986).

Petitioner attempts to create a conflict among the circuits by misstating the Seventh Circuit's holding to be that probable cause is a defense to a claim based on fabricated evidence (Pet. 5). The Seventh Circuit held that probable cause was an essential element of the petitioner's malicious prosecution claim (App. A4), and that because "Cervantes is unable to establish an essential element of his Illinois law claim and his §1983 claim based on the Fourth Amendment," the "district court correctly granted summary judgment" (App. A15).

In urging there is a conflict in the circuits, petitioner cites *Mastrioanni v. Bowers*, 160 F.3d 671 (11th Cir. 1998). However, the Eleventh Circuit *vacated* this opinion and, instead of affirming the district court's denial of immunity, it reversed. *Mastrioanni v. Bowers*, 173 F.3d 1363 (11th Cir. 1998). In *Mastrioanni*, the plaintiffs sued the prosecutors for knowing use of perjured testimony. 173 F.3d at 1365. The Eleventh Circuit held that the prosecutors were absolutely immune because the record did not show the prosecutors acted outside their prosecutorial functions. 173 F.3d at 1367. It also held that the law enforcement officers were absolutely immune for their testimony, and that they had qualified immunity for other actions which did not violate established constitutional rights. 173 F.3d at 1368. *Mastrioanni* does not address whether the bald assertion of false testimony means that a plaintiff does not have to establish all elements essential to his claim when faced with a summary judgment motion.

Petitioner's reliance on *Anthony v. Baker*, 955 F.2d 1395 (10th Cir. 1992) is also misplaced (Pet. 5). *Anthony* does not address the question posed by petitioner, whether §1983 provides a remedy when there is alleged fabricated evidence (Pet. 5-6), but addresses the complaining witness exception (see §II, *infra*).

Finally, *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123 (2d Cir. 1997) does not conflict with the Seventh Circuit's holding in this case. The Second Circuit in *Ricciuti*, like the Seventh Circuit in this case, recognized that establishing a lack of probable cause is an essential element to a malicious prosecution claim. *Ricciuti*, 124 F.3d at 130. Petitioner quotes from the Second Circuit's decision out of context, arguing that

creation of false information "is redressable in an action for damages under 42 U.S.C. §1983." This statement was made while discussing whether lack of probable cause for purposes of qualified immunity was a violation of a clearly established right or was it "legally irrelevant" to a Fourth Amendment unlawful arrest claim. *Ricciuti*, 124 F.3d at 130.

None of petitioner's cases present a true conflict to resolve.

II.

THERE IS NO "COMPLAINING WITNESS EXCEPTION" WHICH DEPRIVES A TESTIFYING WITNESS OF ABSOLUTE IMMUNITY

Petitioner cites to *Anthony v. Baker*, 955 F.2d 1395, 1401 (10th Cir. 1992), which holds that where a testifying witness is also a complaining witness, then the absolute immunity afforded to testifying witnesses is lost. This is known as the so-called "complaining witness exception." The Seventh Circuit did not decide this case based on this exception (App. A7-8), although the district court granted summary judgment on the basis that respondent was not a complaining witness. This question is thus before this Court.[2]

The first question is whether respondent was a complaining witness (who is liable only if he acted with malice and probable cause). As shown above, this is not supported by this record and the district court correctly

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[2] This issue is also raised in a conditional cross-petition for a writ of certiorari to preserve the issue for review in the event this Court accepts this case for review.

held that respondent was not a complaining witness (Pet.App. 18-30; §I(A), *supra*). The second question presented (assuming respondent was a complaining witness) is whether a complaining witness loses absolute immunity when he is subpoenaed to testify, and becomes liable for damages? Respondent submits there is no such exception to the absolute immunity accorded to testifying witnesses.

The "complaining witness exception" to the absolute immunity afforded to testifying witnesses has not been accepted by the Eleventh and Third Circuits. *Jones v. Cannon*, 174 F.3d 1271, 1287 n.10 (11th Cir. 1999); *Kulwicki v. Dawson*, 969 F.2d 1454, 1467 n.16 (3d Cir. 1992). *Jones* properly applied this Court's functional approach. 174 F.3d. at 1282. Where the false statements were "the sole basis asserted for probable cause in the arrest affidavit," there was no immunity from liability arising from that action. *Jones,* 174 F.3d at 1285. However, where that officer also testified before a grand jury, at the criminal trial and during pre-trial depositions, even if the testimony were false, he is absolutely immune. *Id.* at 1286.

The Second Circuit has recognized such an exception. In *White v. Frank*, 855 F.2d 956 (2d Cir. 1988), two police officers were convicted of criminal official misconduct, and one officer admitted he committed perjury in front of a grand jury and at trial, resulting in the plaintiff's conviction. Plaintiff then sued the officers under 42 U.S.C. §1983. The Second Circuit held that because the officers had initiated a baseless prosecution, they were subject to suit. *Id.* at 959-60 (citing *Malley*, 475 U.S. at 340). *White* holds that if a person is involved in

the initiation of a suit, then he is subject to liability for all further actions in those proceedings, regardless of his other functions. *White* cannot be reconciled with the holding in *Briscoe* that testifying witnesses are absolutely immune, even if they commit perjury, and the sole recourse is criminal charges for perjury. 855 F.2d at 961.

The Ninth and Tenth Circuits have also recognized the "complaining witness exception." *Harris v. Roderick*, 126 F.3d 1189, 1198-99 (9th Cir. 1997); *Anthony v. Baker*, 955 F.2d, 395, 1401 (10th Cir. 1992). The Seventh Circuit has discussed this exception without applying it (App. A6-7). *See, e.g., Curtis v. Bembenek*, 48 F.3d 281, 285-86 (7th Cir. 1995) (holding that where a malicious prosecution claim was not stated, plaintiff could not rely on a "complaining witness theory").

Since these decisions were decided (with the exception of *Jones v. Cannon*), this Court has decided *Kalina*, in which it held that a person may be absolutely immune for some functions, and not immune for others. Applying the functional approach, *Kalina* holds that the prosecutor was absolutely immune for actions taken "in connection with the preparation and filing of the two charging documents—the information and the motion for an arrest warrant." *Kalina*, 522 U.S. at 129. She was not immune when she signed an affidavit in support of the application for an arrest warrant which contained false statements because this is not the role of a prosecuting attorney. *Id.* at 129-30. *Kalina* stands for the proposition that acts taken in one function do not taint acts performed in another function and deprive a person of absolute immunity.

The question of whether there is a "complaining witness exception" to a testifying witness' absolute immunity is one which the lower courts have not had sufficient time to consider in light of this Court's decision in *Kalina*. Indeed, only one circuit has considered this exception since *Kalina*, and it determined there was no exception. *Jones*, 174 F.3d at 1287 n.10. There is no post-*Kalina* conflict among the circuits.

However, should this Court accept this case for review, two issues are raised in relation to complaining witnesses. First, is a law enforcement officer a complaining witness merely because he was one (of many) investigating officers and he was subpoenaed to testify? Second, is there a "complaining witness exception" which deprives a testifying witness of absolute immunity for his testimony?

As shown above, this record establishes that the respondent did not initiate or instigate the prosecution. While he was involved in the investigation, this did not make him the complaining witness under the common law understanding of this phrase. The term "complaining witness" is a misnomer because that person is not necessarily a witness, but is the person who initiates or instigates a criminal prosecution (App. 7). *Kalina*, 522 U.S. at 135 (Scalia, J., concurring). At common law, the complaining witness was the person who was victimized and who lodged a complaint with the authorities, commencing a criminal prosecution. *See, e.g., People v. Bernor*, 115 Mich. 692, 74 N.W. 184 (1898); *Schultz v. Huebner*, 108 Mich. 274, 66 N.W. 57 (1896) (drawing distinction between role played by complaining witness and police); *Cudahy v. Powell*, 35 Ill.App. 29 (1889).

A complaining witness was not subject to suit for malicious prosecution unless he acted with malice and in the absence of probable cause. *Kalina*, 522 U.S. at 127; *Malley*, 475 U.S. at 340-41. If there was probable cause, then the defendant's motive or malice was immaterial. *Wagner v. Aultman*, 2 Ill.App. 147, 150 (2d Dist. 1878). As shown above, here there was probable cause, and thus respondent could not be sued as a complaining witness, even if he had a bad motive. Moreover, respondent here was neither the victim, nor was he the person asking the prosecutor to bring charges. At common law, respondent would have been the authority with whom a complaining witness would have lodged his complaint.

That this respondent, as part of his official duties, participated in an investigation with five other law enforcement agencies, does not make him the "complaining witness." This record shows that the respondent wanted to continue the investigation, but the prosecutor decided not to seek a warrant for more physical evidence, but to take the information already developed during the investigation by five law enforcement agencies to the grand jury. True, respondent also was a testifying witness before the grand jury. But he was subpoenaed, and this record shows that he was one of multiple law enforcement officers who could have been subpoenaed to testify about the investigation, according to the prosecutor (App. A28-29). The prosecutor did not decide to subpoena respondent because he was the only one with information and who was instigating the prosecution. Rather, he selected the respondent because he was the most familiar with all aspects of the investigation (App. A28). Because the decision to

prosecute was the prosecutor's alone, the respondent did not instigate the proceeding and was not a complaining witness. *White*, 855 F.2d at 962 (citing RESTATEMENT (SECOND) OF TORTS, §653 comment g (1977). *See also* W. Prosser, LAW OF TORTS, §119 (4th ed. 1971).

If the respondent were held to be a complaining witness under these circumstances, then all law enforcement officers would be subject to a civil rights suit whenever a person is indicted, but not convicted, and the law enforcement officers both investigated the crime and testified at a judicial proceeding. This would mean that all officers would face personal liability whenever an accused is acquitted and accuses the officer of fabricating evidence. Labeling a police officer a "complaining witness" does not vitiate the absolute protection accorded to testifying witnesses. The functions of initiating a prosecution (which respondent did not do here) and testifying in a judicial proceeding are separate and distinct functions. Those circuits which have applied the "complaining witness exception" ignore this.

However, even if respondent were a complaining witness, this did not eviscerate his absolute immunity as a testifying witness before the grand jury. The district court correctly entered summary judgment in respondent's favor on this issue, and this Court should affirm on this alternative basis.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 15, 1999

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-3828

JAMES J. CERVANTES,

Plaintiff-Appellant,

v.

LARRY JONES,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 1520—**George M. Marovich**, *Judge.*

ARGUED MARCH 31, 1999—DECIDED AUGUST 13, 1999

Before POSNER, *Chief Judge*, and FLAUM and MANION, *Circuit Judges.*

MANION, *Circuit Judge.* Officer Larry Jones testified before an Illinois grand jury about evidence linking James Cervantes to the brutal murder of Cervantes' sometimes girlfriend, Sally Lavergne. After hearing the prosecutor's evidence, including Jones' testimony, the grand jury indicted Cervantes for first degree murder. Pending trial, Cervantes remained incarcerated for almost three years. A jury later acquitted him of the murder. Subsequently, Cervantes sued Jones under 42 U.S.C. § 1983 and Illinois law, alleging that Jones violated Cervantes' rights under the Fourth Amendment and Illinois law by testifying falsely before the grand jury. The district court granted

summary judgment for Jones, from which Cervantes appeals. We affirm.

I.

On July 20, 1992, a neighbor discovered the dead body of Sally Lavergne in Lavergne's apartment in South Elgin, Illinois. Lavergne's death resulted from multiple stab wounds from a butcher's knife in her chest and abdomen, although she also suffered severe skull fractures from a beating with a glass ashtray. There were no signs of forced entry, and the assailant fled without leaving any fingerprints. Cervantes became a suspect early in the investigation, as he was one of Lavergne's few friends. Elgin Deputy Chief of Police Larry Jones first interviewed Cervantes on July 20, and again with another officer present on July 25. Late at night on December 8, 1992, after discussing the murder with Cervantes at his apartment, Jones and two other officers took Cervantes to the police station for a polygraph examination. The examination indicated that Cervantes was untruthful when he denied killing Lavergne.

At approximately 5:00 a.m. on December 9, after the police finished questioning Cervantes, Jones drove him home. During the ride, Cervantes and Jones carried on a conversation in which Jones mentioned to Cervantes that it seemed he wanted to come clean. Cervantes' response to this statement is disputed, so we accept his version in the posture of this case. According to Cervantes, he responded: "If I confess to a crime that I did not commit, what would my defense be? I've got too much to lose." Jones tells a slightly different story, but the differences are important. Jones testified to the grand jury that Cervantes' response was: "Yes I would like to do that [confess to the crime]. But I've got too much to lose. If I admit I killed Sally, what would my defense be?" Cervantes contends that Jones also lied to the grand jury by

telling it that Cervantes admitted to lying about whether he was at his mother's house on the day of the murder,[1] that he has difficulty controlling his temper when he drinks, and that he had been drinking and smoking marijuana on the night of the murder.

After hearing the prosecutor's evidence, including Jones' version of events, the grand jury indicted Cervantes for Lavergne's murder. He was arrested and held in custody for almost three years while awaiting his trial for capital murder. On March 7, 1996, he was released from custody when a jury acquitted him. Cervantes sued under Illinois law and 42 U.S.C. § 1983, alleging that Jones violated his Fourth Amendment and Illinois common law rights by maliciously prosecuting him. Jones moved for summary judgment, arguing, among other things, that probable cause existed for the prosecution and that he enjoyed absolute immunity. The district court granted summary judgment for Jones, holding that Jones did not initiate or continue the prosecution of Cervantes, and that Jones was therefore entitled to absolute immunity. *Cervantes v. Jones*, 23 F. Supp. 2d 885, 890, 892 (N.D. Ill. 1998). Cervantes appeals, and we review the grant of summary judgment *de novo*. *DiGiore v. Ryan*, 172 F.3d 454, 459 (7th Cir. 1999).

II.

Section 1983 establishes a cause of action for persons deprived of constitutional rights by government officials acting under color of state law. 42 U.S.C. § 1983. Where a criminal defendant is prosecuted without reasonable grounds and was unlawfully incarcerated before his trial,

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[1] Both we and the parties are being imprecise in referring to the "day of the murder," or the "night of the murder." The police estimate that the murder occurred sometime between 9:45 p.m. on July 19, and 6:30 a.m. on July 20, 1992.

he may bring an action for malicious prosecution under § 1983, ostensibly for a violation of his Fourth Amendment rights. *Smart v. Board of Trustees of the Univ. of Ill.*, 34 F.3d 432, 434 (7th Cir. 1994).[2]

To withstand summary judgment, a plaintiff alleging malicious prosecution under § 1983 must create a genuine issue of material fact as to each element of this constitutional tort. That is, he must provide some evidence that: (1) he has satisfied the requirements of a state law cause of action for malicious prosecution; (2) a state actor committed the malicious prosecution; and (3) he was deprived of liberty. *Sneed v. Rybicki*, 146 F.3d 478, 480 (7th Cir. 1998); *Reed v. City of Chicago*, 77 F.3d 1049, 1051 (7th Cir. 1996). Under Illinois law, the tort of malicious prosecution requires a showing that: (1) the plaintiff was subject to judicial proceedings; (2) for which there was no probable cause; (3) the defendant instituted or continued the proceedings maliciously; (4) the proceedings were terminated in the plaintiff's favor; and (5) there was an injury. *Rybicki*, 146 F.3d at 480-81; *Reed*, 77 F.3d at 1051.

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[2] In *Albright v. Oliver*, the Supreme Court held that an action for malicious prosecution cannot be based on substantive due process, but declined to decide whether the Fourth Amendment could serve as the basis for such suits. 510 U.S. 266, 275 (1994). As some judges have recognized, "the tort of malicious prosecution fits uneasily within the Fourth Amendment. That amendment proscribes unreasonable searches and seizures and has been held to prohibit arbitrary law-enforcement actions up until the time of arraignment. To justify a Fourth Amendment malicious prosecution claim, then, one has to extend the period of 'seizure' past arraignment." *Kerr v. Lyford*, 171 F.3d 330, 343 (5th Cir. 1999) (Jones, J., concurring); *see Wilkins v. May*, 872 F.2d 190, 194 (7th Cir. 1989) (rejecting the concept of a continuing seizure). For present purposes, however, we assume that Cervantes had a right under the Fourth Amendment to be free from malicious prosecution.

The district court granted summary judgment based on the "instituted or continued the proceedings maliciously" element and absolute immunity, which as we shall see, involve essentially the same question. Although the text of § 1983 does not admit of any immunities to suits brought under this section, the Supreme Court has held that these suits are subject to the immunities available at common law, so long as they are not in conflict with the purposes of § 1983. *Burns v. Reed*, 500 U.S. 478, 484 (1991); *Malley v. Briggs*, 475 U.S. 335, 339-40 (1986). Accordingly, in order to protect prosecutors from vindictive lawsuits which might directly or indirectly impede their roles as public servants, prosecutors enjoy absolute immunity for activities which are "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). Similarly, to prevent the harassment of witnesses and to promote unrestrained testimony in criminal cases, the Supreme Court held that witnesses at trials are absolutely immune from suits under § 1983 for providing false testimony at trials. *Briscoe v. LaHue*, 460 U.S. 325, 334 (1983); *see Jurgensen v. Haslinger*, 692 N.E.2d 347, 349 (Ill. App. Ct. 1998) (Illinois law). For the same reasons, this immunity extends to witnesses who commit perjury in pretrial proceedings. *Curtis v. Bembenek*, 48 F.3d 281, 285 (7th Cir. 1995) (police officer entitled to immunity for providing perjurious testimony in probable cause and suppression hearings).[3] Thus, a witness is absolutely immune from suits based on testimony given before a grand jury. *Jones v. Cannon*, 174 F.3d 1271, 1286 (11th Cir. 1999); *Kincaid v. Eberle*, 712 F.2d 1023, 1024 (7th Cir. 1983) (per curiam).

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[3] Again, immunity is extended to these witnesses because "a witness who knows he may be subjected to costly and time-consuming civil litigation for offering testimony that he is unable to substantiate may consciously or otherwise shade his testimony in such a way as to limit potential liability." *Curtis*, 48 F.3d at 285 (citation and internal quotations omitted).

An exception to this wall of immunity for trial and pretrial testimony exists for a "complaining witness." Complaining witnesses were not absolutely immune from malicious prosecution suits at common law.[4] *Malley*, 475 U.S. at 340; *Harris v. Roderick*, 126 F.3d 1189, 1199 (9th Cir. 1997). "The common law made a subtle but crucial distinction between two categories of witnesses with respect to their immunity for false testimony. Those whose role was limited to providing testimony enjoyed immunity; those who played a role in initiating a prosecution—complaining witnesses—did not enjoy immunity." *White v. Frank*, 855 F.2d 956, 958-59 (2d Cir. 1988). To qualify as a complaining witness (and thereby be disqualified from absolute immunity), a witness must play a sufficient role in initiating the prosecution.[5] *Id.* at 962. Of course, merely providing false testimony to a grand jury is not enough. *Id.* at 961. Rather, as we stated in *Curtis*, a complaining witness is one "'who actively instigated or encouraged the prosecution of the plaintiff.'" 48 F.3d at 286 (quoting *Anthony*, 955 F.2d at 1399 n.2); *see Ireland v. Tunis*, 113 F.3d 1435, 1447 (6th Cir. 1997) (no immunity for a "complaining witness who set the wheels of government in motion by instigating a legal action"); *Enlow*, 962 F.2d at 511 (a complaining witness is one who actively instigated,

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[4] The common law distinguished defamation actions from suits for malicious prosecution. All witnesses had immunity from defamation actions for testimony given in court, but complaining witnesses were still subject to lawsuits for malicious prosecution. *Enlow v. Tishomingo County, Miss.*, 962 F.2d 501, 511 (5th Cir. 1992); *see Burns*, 500 U.S. at 501 (Scalia, J., concurring and dissenting). In a defamation action, the plaintiff seeks to hold the perjurious witness liable for the defamatory effects of his testimony; in a malicious prosecution claim, the plaintiff's complaint centers on the witness' role in initiating a meritless prosecution. *Enlow*, 962 F.2d at 511 n.29.

[5] A witness' status as a complaining witness is a question of fact. *Anthony v. Baker*, 955 F.2d 1395, 1399 (10th Cir. 1992).

encouraged, or perpetrated the prosecution). Thus, the term "complaining witness" is something of a misnomer, as the complainant need not testify as a witness so long as he played a significant role in initiating or procuring the prosecution. *Kalina v. Fletcher*, 118 S. Ct. 502, 512 (1997) (Scalia, J., concurring).

As we mentioned above, the district court found that Jones was not an initiator of the prosecution, and thus Cervantes failed to establish an essential element of his Illinois and federal claim and Jones was entitled to absolute immunity. 23 F. Supp. 2d at 890. Indeed, the record showed that while Jones was the one who suggested that the Kane County State's Attorney's Office obtain blood and hair samples from Cervantes, he never exhorted prosecutors to seek an indictment of Cervantes—at least not in so many words. According to the affidavit of the State's Attorney, John Barsanti, he (Barsanti) made the decision to prosecute Cervantes. But we note that Jones was the only witness to testify before the grand jury, and during that testimony he made allegedly false statements indicating that Cervantes essentially confessed to the murder. Jones also appeared to be the lead investigator and the police official who kept the investigation going. *See White*, 855 F.2d at 957, 962 (police officers may be complaining witnesses due to their testimony before a grand jury despite the fact that the prosecutor also played a significant role in advancing the prosecution); *Jones v. City of Chicago*, 856 F.2d 985, 993 (7th Cir. 1988) ("the jury could find that the defendants systematically concealed from the prosecutors, and misrepresented to them, facts highly material to—that is, facts likely to influence—the decision to prosecute"). After considering these and other facts (which we construe in the light most favorable to Cervantes), we think that Jones' role as the instigator of Cervantes' prosecution is a closer question than the district court suggested. As we said in *Jones*, "[i]f police officers have been instrumental in the plaintiff's contin-

ued confinement or prosecution, they cannot escape liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him." 856 F.2d at 994. Thus, because we may affirm a summary judgment on any ground for which there is adequate support in the record, we turn instead to the easier question of whether probable cause existed. *See EEOC v. North Knox Sch. Corp.*, 154 F.3d 744, 746 (7th Cir. 1998).

The existence of probable cause for the prosecution is a complete defense to an action for malicious prosecution under both Illinois and federal law. *Schertz v. Waupaca County*, 875 F.2d 578, 582 (7th Cir. 1989); *Burghardt v. Remiyac*, 565 N.E.2d 1049, 1052 (Ill. App. Ct. 1991).[6] The determination of probable cause is a mixed question of law and fact.[7] *Ornelas v. United States*, 517 U.S. 690, 696 (1996); *Humphrey v. Staszak*, 148 F.3d 719, 725 (7th Cir. 1998). But when facts sufficient to create probable cause are undisputed, probable cause is a question of law. *Potts v. City of Lafayette, Ind.*, 121 F.3d 1106, 1112 (7th Cir. 1997); *People v. Cooke*, 701 N.E.2d 526, 529 (Ill. App. Ct. 1998). Of course, a dispute concerning some facts relevant to the probable cause analysis does not preclude a finding of probable cause so long as the finding survives after adopting the plaintiff's version of the disputed facts for

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[6] The district court did not reach the issue of whether probable cause existed, but relied instead on the grounds mentioned above.

[7] A grand jury indictment is usually prima facie evidence of probable cause. *Bontkowski v. United States*, 28 F.3d 36, 37 (7th Cir. 1994). But in construing the facts in the light most favorable to Cervantes, his allegation that the indictment was the product of Jones' perjury precludes us from considering the indictment in our probable cause analysis. A contrary rule could allow an indictment procured by lies to protect a witness from liability for his perjury. *See Harris v. Roderick*, 126 F.3d 1189, 1198 (9th Cir. 1997).

which there is some support in the record. *Kerr*, 171 F.3d at 340 n.13; *Wolter v. Safeway Stores*, 153 F.2d 641, 642 (D.C. Cir. 1946). Probable cause means "the existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted." *Kerr*, 171 F.3d at 340 (footnote and internal quotations omitted); *see Frye v. O'Neill*, 520 N.E.2d 1233,1241 (Ill. App. Ct. 1988); *Kincaid v. Ames Dep't Stores, Inc.*, 670 N.E.2d 1103, 1109 (Ill. App. Ct. 1996). This analysis is based on " 'factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' " *Humphrey*, 148 F.3d at 726 (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)). Importantly, the official's subjective belief as to the legal basis of the prosecution is irrelevant; the test for probable cause is an objective one. *Graham v. Connor*, 490 U.S. 386, 398 (1989) ("The Fourth Amendment inquiry is one of 'objective reasonableness' under the circumstances . . . ."); *Potts*, 121 F.3d at 1113; *Sheik-Abdi v. McClellan*, 37 F.3d 1240, 1247 (7th Cir. 1994).

In February 1993, the FBI's National Center for the Analysis of Violent Crime prepared a profile of Lavergne's killer based on the evidence gathered from the murder scene, the assailant's modus operandi, and common sense. While this isn't summary judgement evidence itself, it shows how a reasonable person might interpret the facts which were available to Jones. Using their experience with prior violent crimes, the FBI depicted the probable assailant in terms that are strikingly descriptive of Cervantes. The report described the probable assailant as having low socio-economic status, being at least thirty years of age, an alcohol or drug abuser, and someone who has a history of abusing those weaker than he, such as women or children. The FBI report also concluded (as a reasonable person could) that:

* The nature of the wounds, use of multiple weapons, and the knife being left in the victim, suggest person-

alized anger and is normally generated from someone who has an anger towards the victim for a longer period of time than the day of this murder. The offender came to the victim's apartment angry; however, because he used weapons of opportunity he may not have planned to go there to kill her. However, once at the victim's apartment, interaction between the victim and the offender escalated to murder.

* Because the offender took time to conduct some cleanup after the murder, it is likely he was familiar with the apartment, and had a higher degree of comfort in the apartment than might be expected from a stranger.

[FBI Rept. pp 2-3]

Cervantes' correlation with the profile started with his age, as Cervantes was in his early thirties. With respect to his socio-economic status, Cervantes was not affluent, as he was earning $9 per hour at the time he was arrested. There was no sign of a forced entry, which was consistent with the theory that the assailant was (like Cervantes) known to Lavergne or (again like Cervantes) had keys to Lavergne's apartment. Moreover, Cervantes' relationship with the victim was not a fleeting one, as they occasionally had sexual relations—despite the fact that Cervantes was married to another woman, Theresa Cervantes. Police interviews with Lavergne's co-workers, family, and friends revealed that the victim was often seen with a man who appeared to be Hispanic, and that Lavergne would let this man use her apartment, would give him rides to work, and may have loaned him money. Lavergne's neighbor—Lillian Peyton—told police that the Hispanic man's name was "James," and confirmed that James had a key to Lavergne's apartment.

With respect to the FBI's reasoning that the assailant was known to be violent and had festering anger towards the victim, a friend who lived with Lavergne during the

summer of 1991—Arlene Miller—informed Jones that Lavergne had complained that Cervantes had beaten her, and showed bruises from the beatings on her head, face, and arms. These beatings were also in accordance with the FBI's inference that the assailant had a history of abuse toward weaker people. Cervantes' violent nature was further confirmed by Sandra Skoty—Cervantes' former housemate and mother of his child—who told the police that Cervantes had difficulty controlling his temper when he drank alcohol, and that on one occasion when she was pregnant, Cervantes struck her. Theresa Cervantes and Penny Newman (Cervantes' girlfriend and housemate at the time of the murder) also told the police that Cervantes had struck them when he had been drinking, and Theresa Cervantes has a scar on her lip to prove it.

Cervantes was also a known alcoholic, consistent with the FBI's projection that the killer was an alcohol or drug abuser. Furthermore, Newman confirmed what the other women in Cervantes' life said: he was especially violent after drinking alcohol. Beyond Cervantes' correlation with the FBI's profile, numerous other facts cast suspicion on Cervantes. Marilene Gable—a friend of Penny Newman—told police that Newman told her on the night of Lavergne's murder that Newman and Cervantes were going over to James's friend Sally's house that evening. After the murder occurred, Newman told Gable that Lavergne was indeed the woman she and James had intended to visit that night, but that they never made the trip to Lavergne's apartment. Newman gave no reason for the sudden change of plans, other than that Cervantes was tired. As to particularized anger towards Lavergne, the owner of a restaurant that Lavergne frequented—Marguerite Lombardo—told police that Lavergne and an Hispanic man had been at the restaurant a few days prior to the murder, and after the Hispanic man left Lavergne confided to her that the man was "mad" at her because she told him that he could no longer use her apartment.

Furthermore, Cervantes admits that he met Lavergne at the restaurant around that time in order to invite her to dinner while his girlfriend was away. Additionally, Cervantes had an opportunity to commit the crime. Newman told police that she was not sure what time she went to bed the night of the murder and acknowledged that Cervantes might have left the house after she went to sleep, thus negating Cervantes' alibi. Also, a polygraph examination indicated that Cervantes was not being truthful when he denied killing Lavergne.[8] Similarly, Newman's polygraph results suggested that she was untruthful when she denied involvement in the murder or knowledge of who was involved.[9] Finally, another part

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[8] After a suppression hearing (not at issue here) before Kane County Circuit Court Judge James Doyle, Judge Doyle determined that the FBI agent who conducted Cervantes' polygraph examination committed perjury. Specifically, Agent Michael Hanna lied under oath at the suppression hearing when he told Judge Doyle that he was admitted to the Iowa bar. This fact was relevant to the suppression hearing because around the time of the polygraph examination, Cervantes suggested to Hanna that he might like to speak to a lawyer. In an effort to discourage this, Hanna told Cervantes that anything Cervantes wanted to discuss with a lawyer he could address to Hanna, as he was a lawyer. Of course, we find it disheartening, to say the least, that a federal agent would use lies in an attempt to convict a defendant in a capital murder case. But although Cervantes contends that Hanna's penchant for dishonesty tainted the polygraph results, our first analysis of probable cause is based on the information available at the time the prosecution was instituted. At that time, nobody had any reason to suspect that Hanna was dishonest. Regardless, probable cause to prosecute Cervantes existed even without the polygraph evidence.

[9] Cervantes argues that polygraph evidence cannot be considered in determining whether probable cause existed for prosecuting him. It is true that due to the suspected unreliability of polygraphs, Illinois courts have created a rule that the police, grand juries, and courts may not rely on polygraph evidence in deter-

(continued...)

of Cervantes' alibi—that he was at his mother's house sometime during the day of the murder—could not be corroborated. Furthermore, it might seem strange to a reasonable person that Cervantes picked that day to visit his mother, as his mother told police that she hadn't seen him in some time and didn't even know where he lived.[10]

Because probable cause is based on the totality of the circumstances, exculpatory evidence is also relevant. Although Lavergne's blood was found throughout the apartment, no analyzable fingerprints were found. But

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[9] (...continued)
mining whether probable cause exists. *People v. Allen*, 620 N.E.2d 1105, 1114 (Ill. App. Ct. 1993); *People v. McClellan*, 600 N.E.2d 407, 416 (Ill. App. Ct. 1992). But as a matter of federal law, polygraph results are one of many factors which may be used in determining whether, from an objective viewpoint, probable cause for an arrest existed under the Fourth Amendment. *Booker v. Ward*, 94 F.3d 1052, 1058 (7th Cir. 1996) (relying on polygraph results as one factor in finding that Illinois police officers had probable cause for an arrest as a matter of law); *see Kerr*, 171 F.3d at 341 (relying on polygraph evidence in determining that probable cause existed); *Herb Hallman Chevrolet v. Nash-Holmes*, 169 F.3d 636, 643 (9th Cir. 1999) (same); *Craig v. Singletary*, 127 F.3d 1030, 1046 (11th Cir. 1997) (indications of deceptiveness from polygraph may be one factor considered in probable cause analysis); *Johnson v. Schneiderheinz*, 102 F.3d 340, 342 (8th Cir. 1996) ("the negative polygraph exam results were not the only undisputed facts upon which probable cause could rest"); *Marx v. Gumbinner*, 905 F.2d 1503, 1506, 1507 (11th Cir. 1990); *Bennett v. City of Grand Prairie, Tex.*, 883 F.2d 400, 405-06 (5th Cir. 1989) (polygraph results, in conjunction with other evidence, may be used in determining whether probable cause exists to issue warrant). Therefore, this argument is without merit. Furthermore, as we mentioned above, the polygraph evidence was not essential to establishing probable cause.

[10] Cervantes argues that his mother certainly knew where he lived. But her actual knowledge is irrelevant; the question is what did she tell the police, and Cervantes offers no evidence that his mother did not make this statement to the police.

this by no means eliminates probable cause for suspecting Cervantes. Rather, using the rationale employed by the FBI report, the wiping away of fingerprints enhances the suspicion that the assailant was someone like Cervantes, who was familiar with the apartment, knew that nobody was likely to disturb him, and thus was comfortable taking his time to erase any traces of his presence.

More favorable to Cervantes was Lavergne's previous promiscuity and the fact that she once allowed another man to stay overnight in her apartment, thus raising the possibility that someone else committed the crime. Cervantes suggests that this possibility gets some support from the DNA which was extracted from blood found on a towel in Lavergne's bathroom, as it belonged to neither the victim nor Cervantes. Also in Cervantes' favor, there were no eyewitnesses or physical evidence linking Cervantes to the crime. At the same time, there were no eyewitnesses linking anyone else to the crime. Finally, there were Cervantes' own self-serving denials—the value of which was diminished by the polygraph results—and his uncorroborated alibi that he was at home the night of the murder. Perhaps some or all of these tidbits ultimately caused the jury not to find guilt beyond a reasonable doubt. But preliminarily, at least, most of the evidence pointed to Cervantes. He, after all, was the only man known to have had keys to Lavergne's apartment, and he still had one key after the murder. Also, he was the only man Lavergne ever mentioned to her sister Diane. In short, the totality of the facts in the record and the inferences derived from them would lead a reasonable person to the strong suspicion that Cervantes murdered Lavergne. Therefore, even without Jones' disputed testimony, probable cause existed to prosecute Cervantes for this crime. *Cf. Meehan v. Town of Plymouth*, 167 F.3d 85, 91 (1st Cir. 1999) (describing the circumstantial evidence that led to a finding of probable cause). Because the prosecution was supported by probable cause as a matter of law,

Jones has a complete defense to the malicious prosecution suit, and Cervantes is unable to establish an essential element of his Illinois law claim and his § 1983 claim based on the Fourth Amendment.[11] Therefore, the district court correctly granted summary judgment.[12]

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[11] Cervantes also complains that he was not given time to depose Jones and the prosecuting attorney, John Barsanti. In responding to Jones' motion for summary judgment, Cervantes argued to the district court that Barsanti's affidavit was irrelevant, but argued in the alternative that if it were relevant, ruling on the motion should be continued pursuant to Fed. R. Civ. P. 56(f), so that Cervantes could depose Jones and Barsanti. The district court did not abuse its discretion in addressing the summary judgment motion without granting Cervantes additional time for depositions. First, a request for additional time which is conditioned on whether the district court thinks a deposition would be fruitful is not a proper request for a continuance, as it requires the district judge to act as the plaintiff's agent and to advise him on what discovery he should pursue. Also, Cervantes' excuse for failing to depose Barsanti before the motion for summary judgment—that he refrained from taking depositions in order to foster an atmosphere conducive to settlement—is insufficient and borders on the foolish. *See Farmer v. Brennan*, 81 F.3d 1444, 1449 (7th Cir. 1996) (to obtain a continuance under Fed. R. Civ. P. 56(f) a party must (1) request a continuance, and (2) provide a sufficient reason for requesting the continuance).

[12] Because we affirm the summary judgment, Jones' motion to strike Cervantes' reply brief is moot.

[Dated February 25, 1998]

File No. 750204 SMP/els

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMES CERVANTES,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 97 C 1520
	)	
LARRY JONES,	)	JUDGE MAROVICH
	)	
Defendant.	)	Magistrate Judge Ashman

AFFIDAVIT

I, JOHN A. BARSANTI, having been first duly sworn upon oath, depose and state that I have personal knowledge of the facts listed below and if called to testify could and would testify to the following:

1. I am an attorney, licensed to practice in the State of Illinois. I currently am the Chief of the Criminal Division of the Kane County State's Attorney's Office. At all times material and relevant hereto I was an assistant State's Attorney in Kane County, Illinois.

2. In February of 1993, my office was contacted by Larry Jones when he inquired into the possibility of seeking a warrant for hair and blood samples from James Cervantes in connection with the murder of Sally Lavergne.

3. In connection with Jones' inquiry into the possibility of obtaining hair and blood samples from James Cervantes, I independently reviewed the investigative reports into the murder of Sally Lavergne. After that review, I reached the conclusion that there was sufficient grounds to take the matter before the Grand Jury to seek an indictment of James Cervantes for the murder of Sally Lavergne.

4. At no time did Chief Jones ever request that an indictment be sought of James Cervantes, that decision I reached on my own.

5. At no time did Chief Jones ever suggest, cajole, urge, pressure or attempt to influence my decision to seek an indictment of James Cervantes.

6. My reasoning for seeking an indictment in this case was based upon my determination that the following facts and information developed during the course of the Lavergne murder investigation established more than sufficient grounds to believe that James Cervantes was responsible for the murder of Sally Lavergne:

(a) Sally Lavergne was found dead in her apartment at 370 South Ann Street in South Elgin, Illinois on the morning of July 20, 1992.

(b) A neighbor, Edgar Gates, who lived across the hall from the victim's apartment, heard Lavergne's alarm clock ringing inside her apartment. At approximately 6:30 a.m. he went to the victim's door, found it opened, and called the South Elgin police.

(c) The body of Sally Lavergne was found on a couch in her living room. Her night shirt

had been pulled up around her armpits and a butcher knife was found sticking in her chest by the officer who found her body.

(d) A *post-mortem* examination of Sally Lavergne's body was performed on July 21, 1992, by Dr. Larry Blum at the Kane County Morgue, and it was determined that she had died as a result of multiple stab wounds to her chest and abdomen. Several large lacerations were also noted in the victim's scalp and head areas. In addition, she also had suffered multiple blows to the left side of her face and head that resulted in numerous skull fractures. The skull fractures were caused by a blunt object and pieces of glass were found in the matted blood of her hair which suggested she was struck in the head with a heavy glass object. The victim also suffered several cuts on her hands, fingers and wrists that appeared to be defense wounds.

(e) A crime scene technician from the Illinois State Police, Michael Drawhorn, noted a large pooling of blood on the sofa near the victim's head and neck areas. One large and several small pieces of amber glass fragments were observed in this area that were consistent with the glass found in the victim's hair. Blood spatters were observed on the ceiling and on two walls. The blood spattered patterns appeared to radiate from the victim's body. A red-striped shirt soiled with blood was found in the apartment on the floor. Drops of

blood trailed through the kitchen into the bathroom. Blood stains were on the toilet and on paperback books on the floor and sink. There also appeared to be blood stains on the bathtub floor leading technician Drawhorn to believe that the person who murdered Sally Lavergne had washed there. The butcher knife found in the victim's chest was noted by Drawhorn to be similar in nature to other knives and utensils in the victim's kitchen. These facts suggest that the murderer did not plan the murder in advance since he used a weapon from the victim's apartment, that the murderer was familiar with the apartment and that the murder occurred in a fit of rage from the wounds on the victim and blood patterns.

(f) The initial interviews of Ms. Lavergne's neighbors and friends revealed that she routinely had dinner at Ollie's Restaurant in South Elgin, Illinois. Employees of the restaurant informed the police that she had left the restaurant on July 19, 1992 at approximately 9:40 p.m. Therefore, her murder had to have occurred sometime between 9:45 p.m. on the evening of July 19, 1992 and 6:30 a.m. on the morning of July 20, 1992.

(g) The *post-mortem* examination on the victim's body revealed the absence of any sperm in her vaginal area which indicated that the victim was not raped by her assailant.

(h) An inspection of Ms. Lavergne's apartment revealed no signs of a forced entry. This

suggested that Ms. Lavergne knew her assailant and allowed the assailant into her apartment.

(i) The initial interviews of the victim's coworkers, family and friends revealed that the victim was often seen with a man who appeared to be Hispanic. The investigation revealed that she let this man use her apartment, gave him rides to work and may have loaned him money.

(j) On July 20, 1992, Chief Jones interviewed a Lillian Peyton, who was a neighbor of the victim. Ms. Peyton informed Chief Jones that the Hispanic man's name was "James;" that "James'" sister had once lived on the third floor of the same building that the victim lived in, and that "James" had no driver's license due to a DUI conviction. Ms. Peyton further informed Chief Jones that the victim had told her that the victim had given "James" a key to her apartment and that the victim would sometimes get up early and drive "James" to the train station.

(k) On July 20, 1992, Chief Jones spoke to the victim's sister, Diane Burke. In that interview Ms. Burke stated that her sister did not have any friends, would keep to herself and would frequent Ollie's Restaurant. She also stated that her sister worked at Lee Wards Inc. in Elgin. Ms. Burke further stated that her sister had only spoke about one person to her. That person was a Hispanic man whose wife owned a resale shop in the Sunset Park Shopping Center in Elgin. She said her sister would occa-

sionally give rides and pick up that man at the train station.

(l) Chief Jones later that day checked at the Sunset Park Shopping Center and found a shop called the "Kiddie Korner Children's Resale." Chief Jones checked with the Elgin police and learned that the business owners were a James and Teresa Cervantes.

(m) Chief Jones then checked the driving record of James Cervantes and determined he had no valid driver's license and that Cervantes' sister, Cora, had once lived in the same building as the victim, Sally Lavergne.

(n) During the afternoon hours of July 20, 1992, Chief Jones and Investigator Paulsen of the South Elgin Police Department interviewed Helen Cervantes, the mother of James Cervantes. Mrs. Cervantes told them that James had separated from his wife, that he was living at an unknown location, and that Mrs. Cervantes had not seen her son for sometime.

(o) On July 20, 1992, Mr. Cervantes was living with another woman by the name of Penny Newman. On July 20, 1990 Chief Jones located James Cervantes and interviewed him at his apartment in the presence of Penny Newman. Mr. Cervantes informed Jones that he had known the victim for a number of years and that he and the victim, Sally Lavergne, were close friends. He stated that he at one time he had a key to the victim's apartment but

that he had returned the key to Ms. Lavergne in March, 1992. He admitted that when he was having marital problems, he would occasionally spend the night at the victim's apartment. Mr. Cervantes claims that he had not seen the victim for approximately two to three weeks. He also informed Chief Jones that he had visited his mother during the afternoon of July 19, 1992, done some shopping, and was home that evening with Ms. Newman and did not leave his house. Cervantes' statement concerning a visit to his mother the day before contradicted what Mrs. Cervantes told the investigators concerning when she had last seek her son.

(p) Deputy Chief Jones also interviewed Marguerite Lombardo on July 21, 1992. She is one of the owners of Ollie's Restaurant. Chief Jones was advised that the victim, Sally Lavergne, ate many of her meals at "Ollie's" and was a regular customer. At that time, she informed Chief Jones that the victim had been in the restaurant during the late afternoon of July 16, 1992 and met a male Hispanic subject who fit the description of James Cervantes. She had seen this gentleman in the restaurant before. The victim and the Hispanic male moved from the counter to a booth where they had a conversation. After the Hispanic male subject left the restaurant, Sally Lavergne told Ms. Lombardo that the man was mad at Ms. Lavergne because she had told him that he could not use her apartment anymore.

(q) Det. Sgt. David Jannusch of the St. Charles Police Dept. was advised during a July 23, 1992 interview of Arlene Miller that Ms. Miller and her boyfriend had temporarily stayed at the victim's apartment for two to three months during the summer of 1991. During that time, Ms. Miller came to know a male Hispanic named "James". Ms. Miller told Det. Jannusch that she and her boyfriend would leave the apartment so that James could spend the weekends there with Sally. Following at least one of the weekend visits, Ms. Miller informed Jannusch that she saw bruises on Sally Lavergne's head, face and arms and on one occasion she had a black eye. When questioned by Ms. Miller, Sally Lavergne told her that "James got mad".

(r) Sgt. Jannusch also interviewed a Sandra Skoty, who had once lived with James Cervantes in St. Charles, Illinois and had given birth to a child by Cervantes. Det. Jannusch was told that Cervantes drank heavily and had difficulty controlling his temper when he was intoxicated. On one occasion, when Cervantes was intoxicated, he struck and slapped Ms. Skoty while she was pregnant.

(s) On July 24, 1992, Deputy Chief Jones interviewed Teresa Cervantes, James Cervantes' estranged wife. At that time, Jones was told that on several occasions she confronted her husband about his drinking and that he struck her in the face on one occasion, leaving a scar on her lip.

(t) On July 25, 1992, Deputy Chief Jones and Det. Sgt. John Piccolin of the West Dundee Police Dept. again interviewed James Cervantes. During that interview he admitted that he and Sally Lavergne had been lovers and that he would frequently use her apartment for sexual rendezvous with the victim. In that interview Cervantes also indicated he last saw the victim on Wednesday, July 15, 1992, at Ollie's Restaurant when he stopped there to visit with Sally and to invite her to dinner on July 24, 1992, because his live-in girlfriend (Penny Newman) would be out of town. Cervantes also gave Chief Jones a set of keys which he had located which he thought may be to the victim's apartment. Subsequently, Chief Jones verified that one of the keys which Cervantes gave him fit the deadbolt to the victim's apartment. During that interview, Chief Jones drew a rough sketch of the victim's apartment and showed the sketch to Cervantes. Jones told Cervantes that there was a clean area near the couch where Ms. Lavergne's body was found. Jones stated that they could not determine what was possibly missing. Cervantes then told the investigators, "a big, brown glass ash tray, the kind you would see in a doctor's office, she had three of them in the apartment."

(u) On August 21, 1992, Sgt. Jannusch interviewed Marilene Gabel, who was a friend of Penny Newman, the then live-in girlfriend of James Cervantes. Ms. Gabel informed Det. Jannusch that she had been

visiting Ms. Newman at her apartment with Cervantes on July 19, 1992. Ms. Newman told Ms. Gabel that she and James Cervantes were going to visit a friend of Cervantes later that evening named "Sally." On July 21, 1992, Gabel had a telephone conversation with Penny Newman during which conversation Newman related that the police had questioned her and James Cervantes about the death of a woman named Sally. Gabel then inquired of Newman if this was the same person she and Cervantes were supposed to have visited on July 19, 1992. Newman replied that it was the same person, however, Ms. Newman told Gabel that she and Cervantes had not gone over to the victim's apartment.

(v) On November 28, 1992, several of the investigative officers interviewed Cervantes' girlfriend, Penny Newman, and learned that Ms. Newman had left Cervantes after Cervantes had become angry at her while intoxicated and beat her. During that interview, Newman informed the investigators that she was unsure what time she had gone to bed on the evening of July 19, 1992, and acknowledged that Cervantes could have left the house after she went to bed without her knowledge.

(w) A polygraph examination was administered to Penny Newman on the evening of December 8, 1992, by FBI Special Agent Edward T. Hamara. It was the conclusion of FBI Special Agent Hamara that Ms. Newman did not pass her polygraph exam-

ination. She was asked whether she was involved in any way with the death of Sally Lavergne and whether she knew for sure who caused the death of Ms. Lavergne. It was the opinion of Agent Hamara that her responses to those questions were indicative of deception. In a post-polygraph interview with FBI Agent Hamara on December 8, 1992, Ms. Newman informed him that James Cervantes was a violent person, especially after drinking, and that he had struck her at least three times during their relationship and that it was possible that Cervantes had left their apartment on the night that Sally Lavergne was murdered.

(x) On December 8, 1992, Chief Jones, Sgt. Jannusch and Det. Piccolin interviewed James Cervantes. At that time he admitted that he had difficulty controlling his temper when he drinks. He also admitted that he was drinking and smoking marijuana on the evening of July 19, 1992. He also admitted that he had physically abused many women in the past that he had been romantically involved with and admitted to having physically abused Sally Lavergne in the past, but did not believe his actions would have led to any marks or bruising. He also admitted that he may have lied to the police about visiting his mother on July 19, 1992, and about not having a key to the victim's apartment..

(y) On December 9, 1992, a polygraph examination was administered to James Cervan-

tes by FBI Agent Michael Hanna. It was the conclusion of Agent Hanna that Mrs. Cervantes' responses to questions concerning whether he was the person who caused the death of Sally Lavergne were indicative of deception. In a post-polygraph interview with FBI Special Agent Michael Hanna on December 9, 1992, James Cervantes admitted that he had been drinking and smoking pot on the day of Sally Lavergne's murder. He admitted to Agent Hanna that he had been smoking pot in a park near Sally Lavergne's residence the evening of the murder. He further admitted to Agent Hanna that he may have walked up to the victim's residence, but does not remember going inside. A blow-up of what appeared to be a bloody fingerprint taken from the underside of a toilet seat in the victim's apartment was shown to Cervantes by Agent Hanna and Cervantes admitted that the fingerprint might have been his. When questioned about this, Mr. Cervantes indicated he could not remember anything and that he wished to tell his story but with an attorney present. Agent Hanna then terminated the interview.

(z) The reports of FBI Agent Hanna and Hamara are attached hereto as Exhibit "A."

7. Attached to my affidavit as Exhibit "B" is a true and correct copy of the report of proceedings before the Kane County Grand Jury on March 16, 1993, following which an indictment was returned of James Cervantes for the murder of Sally Lavergne.

8. I am aware that James Cervantes is claiming that he did not make a certain statement to Chief Jones following his polygraph examination on December 9, 1992. That conversation took place in Chief Jones' car as Jones was driving Mr. Cervantes home. Chief Jones told Cervantes that he looked as if he wanted to tell someone what he had done, take whatever punishment there might be and get on with his life. Chief Jones reported that Cervantes told him that, he would like to, but that "I have too much to lose" and that, "if I admitted that I murdered Sally Lavergne what would my defense be?" Those statements were contained in the reports I reviewed. However, those statements did not play a role in my decision to seek an indictment of James Cervantes because in my view, those statements were equivocal in nature. I would have sought an indictment of Cervantes even if those statements were not made by James Cervantes following his polygraph examination.

9. Various officers and agents from the South Elgin Police Department, the FBI, the Illinois State Police Department, the St. Charles Police Department and the West Dundee Police Department participated in the investigation of the murder of Sally Lavergne. I could have selected any one of the agents or investigators from the various police departments or agencies who participated in the investigation to testify before the Grand Jury. I selected Larry Jones to testify because the murder occurred in South Elgin and he was the highest ranking officer from that department involved in the investigation and was familiar with all aspects of the investigation that had been completed to date. If, for any reason, he was unable to appear before the

Grand Jury, I could have requested another one of the other investigators to testify before the Grand Jury. I had a subpoena issued to Larry Jones to appear before the Grand Jury.

10 Following the indictment of James Cervantes, a motion to suppress was filed before the Honorable Judge James Doyle in the Circuit Court of Kane County. In that motion, Mr. Cervantes claimed that certain statements he made to FBI Agent Hanna and to Larry Jones were involuntary and were made in violation of his *Miranda* rights. Cervantes claimed that his statements were involuntary because they were the product of "deceit, trickery and promises of leniency." Cervantes claimed that FBI Agent Hanna told him that he did not need a lawyer because Hanna was a lawyer. Cervantes also claimed that Hanna offered to get him committed to a hospital rather than a prison. Agent Hanna denied making any promises of leniency.

11. Cervantes testified at the hearing on the motion to suppress. He denied making various statements to FBI Agent Hanna that Hanna claimed he made in the post-polygraph interview. He also denied telling Chief Jones that, "If I admitted I murdered Sally what would my defense be?" Cervantes claimed he told Chief Jones that "If I confess to a crime that I did not commit what would my defense be?"

12 One of the witnesses who testified at that hearing on the motion to suppress was Special Agent Michael Hanna of the FBI. Agent Hanna testified under oath that he graduated from law school at Creighton University in 1980 and testified that he was admitted to the Iowa bar later that year. At the conclusion of all the

testimony, Judge Doyle requested memoranda from each side and postponed argument.

13. After Agent Hanna had testified at the hearing on the motion to suppress, he contacted me and informed me that he was not in fact a lawyer. He advised me that he had taken the Iowa bar exam twice and had not passed. After receipt of that information, I disclosed to Judge Doyle the information FBI Agent Hanna had told me concerning his status as a lawyer and his attempts to pass the Iowa bar exam.

14. On February 25, 1994, Judge Doyle rendered his decision. He found specifically that on the evening that James Cervantes took the polygraph examination and made certain admissions to Agent Hanna in the post-polygraph interview and separately to Chief Jones, that Cervantes was not under arrest and he therefore concluded there was no *Miranda* violation.

15. Judge Doyle, however, concluded that Special Agent Hanna had deliberately lied on the witness stand and was not credible as a witness. He concluded that Hanna was a liar and did not believe Hanna's denials of leniency or his version of the statements Cervantes made in the post-polygraph interview in light of Cervantes' denial of those statements. Judge Doyle accordingly accepted Cervantes' version of that interview and then concluded that the State had failed to meet its burden to prove that Cervantes' statement to FBI Agent Hanna was voluntary and suppressed the statement which Cervantes made to Hanna in the post-polygraph interview. Judge Doyle went on to hold that Cervantes statement to Chief Jones was tainted by the involuntary nature of his statement to Hanna and also

suppressed Cervantes' statement to Chief Jones as "fruit of the poisonous tree." However, Judge Doyle in his ruling also made a specific finding that Chief Jones' testimony was credible.

16. The State then appealed Judge Doyle's decision. The Second Appellate District in a Rule 23 Order affirmed Judge Doyle's suppression of Cervantes' statements to FBI Agent Hanna. However, the Second Appellate District reversed Judge Doyle's order suppressing Cervantes' statement to Chief Jones. The Rule 23 Order of the Second Appellate District is attached hereto as Exhibit "C."

17. After receipt of the Second Appellate District's Rule 23 Order which was filed on March 13, 1995, I made the decision to continue the prosecution of James Cervantes. Chief Jones did not pressure, urge or attempt to influence my decision in any way. I was fully aware at that time that James Cervantes was disputing the conversation that he had with Chief Jones following his polygraph examination on the evening of December 9, 1992. As a result of that ruling on the motion to suppress, we were unable to introduce Cervantes' admission to FBI Agent Hanna that a bloody smudge of fingerprint found on the underside of a toilet seat in the victim's apartment might have been his. We were also unable to introduce his admission that he had been drinking and smoking pot in a park behind the victim's apartment building on the night of the murder and remembered walking up to the door of the victim's apartment building the evening Sally Lavergne was murdered.

FURTHER YOUR AFFIANT SAYETH NOT.

/s/ John A. Barsanti
JOHN A. BARSANTI

SUBSCRIBED and SWORN to before me
this 25th day of February , 1998.

/s/ Barbara R. Daly
NOTARY PUBLIC

U.S. Department of Justice
Federal Bureau of Investigation

In Reply, Please Refer to
File No. 252B-CG-88010

FBI Academy
Quantico, VA 22135
February 22, 1993

UNKNOWN SUBJECT;
SALLY A. LAVERGNE - VICTIM (DECEASED)
SOUTH ELGIN POLICE DEPARTMENT,
SOUTH ELGIN, ILLINOIS,
7/20/92
NCAVC - HOMICIDE
(CRIMINAL INVESTIGATIVE ANALYSIS)
OO: CHICAGO

The following consultation summary was prepared by Supervisory Special Agent (SSA) Stephen E. Etter, to summarize a consultation held at the National Center for the Analysis of Violent Crime (NCAVC), FBI Academy, Quantico, Virginia on September 22, 1992 with members of the South Elgin Illinois Task Force, Special Agent Marie Dyson of the Chicago FBI Office, and members of the NCAVC.

This analysis is based upon a review of the materials submitted, and the conclusions are the result of the knowledge drawn from the personal investigative experience, educational background, and research conducted by this analyst as well as by other NCAVC members. It is not a substitute for a thorough, well planned investigation and should not be considered all-inclusive. The analysis is based upon probabilities, not-

ing, however, that no two criminal acts or criminal personalities are exactly alike and, therefore, the offender at times may not fit the analysis in every category.

This analysis contains information of a confidential and sensitive nature and is provided for your investigative assistance. It should not be disseminated except to other criminal justice agencies with a legitimate investigative or prosecutive interest in this matter.

As a result of a consultation being held at the NCAVC, with case investigators present, all of the details and information regarding the victim, and the pathologists report will not be restated in this report. These areas will only be summarized. The Offender Traits and Characteristics, and Post-Offense Behavior Sections will list likely characteristics of the offender. These items will be a listing of the general characteristics discussed during the consultation on September 22, 1992.

VICTIMOLOGY AND WOUND SUMMARY

The victim was a 48-year old, white female who lived alone in an apartment in a low income, mixed racial neighborhood, consisting of whites, blacks, asians, and hispanics. The victim was divorced form her husband in 1981. She was a high school graduate and employed as an "order picker" in a local warehouse. The victim was known to allow homeless people to stay overnight in her apartment. She has been described as mentally slow, sexually promiscuous, and eccentric. Because of her lifestyle this victim would be viewed in a range of moderate to high in her risk level of becoming a victim of a violent crime.

The victim's body was discovered in her apartment by a neighbor who responded to the continuous ringing of the victim's alarm clock. The victim suffered from multiple skull fractures as a result of repeated blunt force strikes, as well as two stab wounds to the throat and five to her torso.

OFFENDER TRAITS AND CHARACTERISTICS

* White male (crimes of this nature are generally intraracial, however because of the racial mix in the neighborhood he could be racially different than the victim).

* Age level beginning at 30 and increasing to the age of those people the victim would normally associate with.

* History of violent emotional outbursts, volatile personality, inability to control emotions for any extended time period.

* The nature of the wounds, use of multiple weapons, and the knife being left in the victim, suggest personalized anger and is normally generated from someone who has had anger towards this victim for a longer period of time than the day of this murder. The offender may have had prior arguments with the victim. The offender came to the victim's apartment angry however, because he used weapons of opportunity he may not have planned to go there to kill her. However, once at the victim's apartment, interaction between the victim and offender escalated to murder.

* Because the offender took time to conduct some cleanup after the murder, it is likely he was familiar

with the apartment, and had a higher degree of comfort in the apartment than might be expected from a stranger.

* Likely has a poor employment history because of his volatile personality, and inability to accept criticism.

* Low socio-economic status, roughly consistent with that of the victim's.

* Alcohol and/or drug abuse may be present however, only minimally influenced the offenders acts during the murder, subsequent cleanup, and escape from the scene.

* Is unable to negotiate with people and his inability to control his temper is noticeable by those who know him. His history of abuse to others may be directed toward people weaker than he, i.e. women, children, etc.

* Arrest history would likely show domestic disturbances, and destruction of property type charges.

POST-OFFENSE BEHAVIOR

* This offender would not likely show remorse however, would be concerned about being discovered as the person responsible for the murder, consequently his behavior after the murder would be noticeably different to those who know him. He may have appeared agitated or restless, exhibited changes in his sleeping habits, increased or decreased his use of alcohol or drugs. He may have attempted to control his demeanor which others would describe as uncharacteristic, or "over-controlled."

* Because of the offender's prior association with the victim he may have been interviewed during the course of the investigation. He would initially appear very cooperative until he believed he had become a suspect, at which time he would become anxious and possibly look for a reason to leave the area. However, he would only leave if he had a "legitimate" reason, i.e. obtain another job, etc.

* Because of his inability to maintain his emotional control during times of stress, he is not likely to interject himself into this investigation.

* He would likely be very anxious for 24-48 hours after the murder and at any time the investigation focuses on him.

* Will rationalize the murder by convincing himself that the victim deserved it, or acted in a way which contributed to her death.

If your department desires further consultation of this case, contact SSA Stephen E. Etter, directly at the NCAVC, FBI Academy, Quantico, VA, (703) 640-1438, or Special Agent Marie L. Dyson, FBI Chicago, (312) 431-1333.